

No. 10550

United States ²
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware,
Appellant,
vs.

PETER BERGUT, HENRI BERGUT, M. MAFFEI and L. R. ARNOLD,
Appellee.

Transcript of Record
In Two Volumes

VOLUME II
Pages 501 to 982

Upon Appeal from the District Court of the
United States for the Northern District
of California, Southern Division.

FILED

DEC 17 1943

PAUL P. O'BRIEN,
CLERK

No. 10550

United States
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware,

Appellant,

VS.

PETER BERCUT, HENRI BERCUT, M. MAFFEI and L. R. ARNOLD,

Appellee.

Transcript of Record
In Two Volumes

VOLUME II

Pages 501 to 982

Upon Appeal from the District Court of the
United States for the Northern District
of California, Southern Division.

H. R. GAITHER,

called for plaintiff; sworn. [332]

Direct Examination

Mr. Scampini: Q. Mr. Gaither, your address is where? A. 333 Montgomery Street.

Q. What is your profession or business?

A. Banking.

Q. Are you president of the Pacific National Bank of San Francisco? A. I am.

Q. How long have you been its president?

A. Since about 1929.

Q. Is it not a fact that on or about 1932 or 1933 the City National Bank of San Francisco was merged with the Pacific National Bank of San Francisco? A. The stock was purchased.

Q. And shortly thereafter Pacific Empire Corporation and Pacific Empire Holdings as a result of the merger became substantial holders of the outstanding stock of the Pacific National Bank of San Francisco; is that correct? A. Yes.

Q. And Mr. Maffei and Mr. Arnold became directors of the bank, is that right?

A. That is right.

Q. Is it true or not that sometime in 1940 Mr. Peter Bercut became a director in your bank?

A. Yes.

Q. Did he succeed Mr. Arnold as a director?

A. Not necessarily Mr. Arnold. We put Mr. Bercut on. Mr. Arnold had been out previous to that time.

(Testimony of H. R. Gaither.)

Q. Then Mr. Maffei discontinued?

A. That is right.

Q. Now, for a period of years the bank carried some very heavy loans for Pacific Empire Holdings and Pacific Empire Corporation, did it not?

A. Yes.

Q. Going back to the days of the merger of the City National Bank with the Pacific National Bank, is that correct? A. Yes.

Q. Can you state whether those loans were secured or unsecured—whether your records show?

A. They do.

Q. Were they secured?

A. They were secured. [333]

Q. Were they amply secured?

A. We had ample security.

Q. Now, sometime in 1940 or thereabouts did the Pacific National Bank of San Francisco carry any loans for Merchants Ice & Cold Storage Company? A. Yes.

Q. Do your records indicate approximately how much those loans were at the end of 1940?

A. They do.

Q. Will you please state how much those loans were?

A. On January 1, 1941, the Merchants Ice & Cold Storage Company owed us \$21,690.01. We had discounted bills receivable of \$43,726.20, and the Merchants had a contingent liability, covering paper notes for their own customers of \$53,598.11.

(Testimony of H. R. Gaither.)

Q. As to the item which you have just last read, is it not true that that represents commercial paper taken by Merchants Ice & Cold Storage Company from its customers and discounted at the bank?

A. Yes.

Q. And was it good commercial paper?

A. It was.

Q. Was it a good loan for the bank?

A. It was.

Q. Take the notes payable to the bank by Merchants Ice & Cold Storage Company of approximately \$21,000.

A. That also was amply secured by an ice contract.

Q. By an assignment of an ice contract?

A. Yes.

Q. Did you consider it to be a good loan?

A. Yes, I did.

Q. There were also some accounts receivable?

A. Yes, \$42,726.20.

Q. Secured by accounts receivable current how much?

A. I could not give you the exact figure, but I think it was a margin of *least* 10 or 15—I know it was 10; it might have been 15.

Q. Did you consider that to be a good loan?

A. I did.

Q. Is it or is it not true that during the latter part of 1940 Pacific National Bank of San Francisco criticized any of the loans [334] of the Pacific

(Testimony of H. R. Gaither.)

Empire Holding Company or Pacific Empire Corporation?

A. The Pacific Empire Holdings loan and Pacific Empire Corporation were criticized because the main security was our own bank stock.

Q. Did you consider that loan to be a good loan?

A. I did.

Q. Who criticized that loan?

A. The National Bank Examiners.

Q. Because of some statutory condition?

A. On the statutory condition that it was secured directly by our own bank stock.

Q. Was there any criticism of any Merchants Ice & Cold Storage Company loan?

A. The only criticism of the Merchants Ice & Cold Storage Company was back in 1939 when the National Department ruled that when you gave the limit of any one loan to a corporation you had to include in that loan the obligation of the corporation where the holding company had more than fifty per cent of the outstanding stock.

Q. Was that criticism cleared up subsequently?

A. It was.

Q. Now, as a matter of fact, the loan of the Pacific Empire Corporation was subsequently repaid in full by the sale of Pacific National Bank stock?

A. Correct.

Q. Did Pacific National Bank of San Francisco, to your knowledge, or you as president ever bring any pressure to bear upon Merchants Ice &

(Testimony of H. R. Gaither.)

Cold Storage Company, Pacific Empire Holdings or Pacific Empire Corporation, or Mr. Arnold, to pay off this loan of the Merchants Ice & Cold Storage Company?

A. The only thing we said was that we had reduced the line of their credit on account of the National Bank ruling on it.

Q. Did you ever bring any pressure on them toward disposition of the Merchants Ice & Cold Storage stock in order to do that?

A. No.

Mr. Scampini: That is all. Take the witness.

[335]

Cross Examination

Mr. Naus: Q. Mr. Gaither, you spoke of an item of \$21,690 secured by an ice contract?

A. Yes.

Q. When was that security given?

A. We had that loan at various times, at one time back in December of 1939, and it was paid up, and then we took it back again, on October 24, 1940.

Q. Now, that ice contract, would you describe it a little more for his Honor? What do you mean by ice contract?

A. As I understand, it was an agreement between the Merchants Ice & Cold Storage Company and the National Ice & Cold Storage Company whereby they formed a delivery ice company.

Q. The City Ice Delivery Company?

(Testimony of H. R. Gaither.)

A. The City Ice Delivery Company. What percentage of interest the Merchants Ice & Cold Storage Company and what interest the National had, I don't know.

Q. But you loaned on the security of the contract? A. Yes.

Q. For the making and the delivery of ice for a period of about a year?

A. Probably two years.

Q. That was ice to be thereafter made in the future? A. That is correct.

Q. That is to say, it depended on the ability of the Merchants Ice & Cold Storage Company to pay its power bills and wages, taxes, and so on, and keep making ice for the contract period?

A. I think the company had other assets besides that.

Q. Now, what was the interest rate on that last loan there ?

A. I cannot answer that, but I think it was six per cent.

Q. Couldn't it have been as high as eight per cent?

A. I can verify it for you. I have some records here, if you will permit me to look at them.

Q. As of January 1, 1941, the date that you gave, what was the interest rate as of that time?

A. Excuse me if I am a [336] little slow on picking it out. I do not have much to do with this work.

(Testimony of H. R. Gaither.)

The Court: There are not many bank presidents who can do what you are doing now.

Mr. Naus: I am informed by the accounting department of the Merchants Ice & Cold Storage Company that they were paying, as I understand it, eight per cent. There could be a mistake. I don't know what the fact is.

A. I have not got that record here; that one is missing, but I think it was six per cent. I could verify it.

Q. I will pass that. On the bills receivable \$42,726 that you discounted, what was the rate of discount?

A. Either seven or eight per cent.

Q. More likely eight than seven?

A. Probably so.

Q. On the contingent paper what was the rate of discount?

A. Six per cent.

Q. By the way, you recall, do you not, along about January 8, 1941, the sale of the Merchants Ice & Cold Storage stock to Mr. Bercut?

A. Yes.

Q. Subsequent to that sale, state whether or not you reduced the interest rate charged the Merchants Ice & Cold Storage Company.

A. After the sale we did. Mr. Bercut guaranteed the loan.

Q. You reduced it to what rate—what per cent?

A. I can tell you that in a minute. Yes.

Q. In other words, you reduced the interest from whatever rate it was to four per cent simply be-

(Testimony of H. R. Gaither.)

cause Mr. Bercut was in and gave you his personal guarantee? A. Yes.

Q. What was the maximum amount you extended those credits at any time since he got in there?

A. \$115,000, we made a loan, and I think the guarantee was \$100,000. [337]

Q. In other words, after taking the company over Mr. Bercut gave his personal guarantee, which the bank accepted? A. It did.

Q. Up to a maximum of \$100,000, and they were perfectly willing to accept that guarantee and reduce the interest rate? A. That is right.

Q. When you extended that credit to Merchants Ice & Cold Storage Company you were doing it on the strength of Mr. Bercut's personal guarantee?

A. Yes.

Q. He had filed a financial statement with you of his condition? A. Yes.

Q. Will you state what his financial net worth purported to be, as you recall?

A. It was in the rough—I couldn't give you the exact figures—approximately a million dollars.

Q. As I understand, you were perfectly willing to extend any reasonable amount of credit on the basis of his financial report showing a net worth of one million dollars? A. Yes.

Q. In other words, Mr. Bercut's personal credit was substantially better than the credit of the Merchants Ice & Cold Storage Company, was it not?

A. Yes.

(Testimony of H. R. Gaither.)

Redirect Examination

Mr. Scampini: Q. Had you ever refused any reasonable extension of credit to the Merchants Ice & Cold Storage at any time?

A. Not as long as they had security.

Q. You would not, of course, refuse it if it had been requested on the basis of any reasonable security; is that true? A. Yes.

Q. Whether on Mr. Bercut's individual security or Merchants Ice & Cold Storage security, or anybody else's? A. That is right.

Mr. Scampini: That is all. [338]

Mr. Naus: I have been informed I was in error on the loan on the ice contract. That was six per cent.

WALTER O. H. PLAGEMANN,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Plagemann, your full name is Walter O. Plagemann?

A. Walter O. H. Plagemann.

Q. I have known you for some years?

A. Yes, you have.

Q. You have been secretary of the Merchants Ice & Cold Storage Company for many years, haven't you? A. Yes, I have.

Q. How many years have you been secretary?

(Testimony of Walter O. H. Plagemann.)

A. I have been there as secretary—I don't know exactly—I have been twenty-five years with the company.

Q. You were secretary when I was a director of your company? A. Yes.

Q. You were secretary under Mr. Sherman's regime, were you not? A. Yes.

Q. And under Mr. Stratton's and Mr. Vincent's regime? A. Correct.

Q. And under Mr. Arnold's? A. Yes.

Q. So you know the history of this company pretty well, don't you? A. Yes.

Q. How far back does it go?

A. In 1917 I started in as a clerk and gradually worked myself up to be assistant secretary and finally secretary-treasurer. After a few years, after four or five years, I was assistant secretary, and in 1929 or 1930 I became secretary.

Q. Mr. Plagemann, during the years 1917 clear up to 1928, when the depression started in, in 1929, the Merchants Ice & Cold [339] Storage Company had some good earning seasons?

A. In previous years?

Q. Yes. A. Yes.

Q. It always earned money?

A. Not always.

Q. When did it not earn money?

A. Well, in 1924 the new building was put up, and in 1927 it gradually dropped down.

(Testimony of Walter O. H. Plagemann.)

Q. In 1929, of course, the depression set in all over the United States? A. Yes.

Q. Isn't it true that during the period from 1929 down to 1935 the entire industry as a whole, and by that I mean the cold storage and ice industry, throughout the United States, had practically the same down trend in business activity as was suffered by the Merchants Ice & Cold Storage Company?

A. All over the United States there was a downward trend.

Q. That is true of its competitor, the National Ice & Cold Storage Company?

A. Everybody suffered.

Q. The National Ice & Cold Storage Company defaulted in their bond issue?

A. As far as I recall. I never studied it to see, but I understand it did.

Q. Did the Merchants Ice & Cold Storage Company through all of this period of the depression ever default on its bond issue?

A. Not until the reorganization was put through.

Q. Was that a default?

A. It was an indication, in my opinion, that something had to be done.

Q. The bondholders gave it an extension on the payment of the principal, didn't they?

A. Five years.

Q. Did it ever fail to make the payment of interest on the outstanding bonds from the very inception?

(Testimony of Walter O. H. Plagemann.)

A. Not the interest; the interest was not defaulted at any time provided for until the year the reorganization plan was put into [340] effect.

Q. Then they continued to pay interest during the moratorium? A. Yes.

Q. The bond issue was originally \$1,200,000?

A. Yes.

Q. It is down to a little more than \$600,000?

A. Yes.

Q. All of that has been paid out of earnings of the company, hasn't it?

A. Well, whether you would call it earnings of the company or how you would interpret it, I don't know.

Q. You have not had any new capital invested?

A. No.

Q. At any time since the bond issue?

A. No.

Q. Clear down to the present time?

A. No.

Q. And the company paid off its obligations, is that right? A. Yes.

Q. Have you ever closed down business?

A. No.

Q. Have you continued to operate the business ever since then? A. Continued right along.

Q. Sometimes, of course, you had some difficulty in meeting your obligations? A. Correct.

Q. But you were never closed down by any of your creditors, were you?

(Testimony of Walter O. H. Plagemann.)

A. Well, pretty close sometimes.

Q. You managed to survive? A. Yes.

Q. You managed to survive better than the National Ice & Cold Storage Company?

A. I don't know about the condition of the National Ice & Cold Storage Company. I know we had quite a problem with the Merchants Ice.

Q. As a matter of fact, Mr. Plagemann, under the regime of Stratton and Vincent and Mr. Sherman and Mr. Arnold there was some very poor management, was there not, in your opinion?

A. Yes.

Q. There were a lot of shenanigans in the company, were there not? [341]

A. They thought money was growing on trees.

Q. You recall the time that Mr. Scampini was up at the Merchants Ice & Cold Storage Company and called Mr. Sherman a crook, don't you? Weren't you there?

The Court: I don't know how much that is going to help us here, hearing any remarks like that.

Mr. Scampini: Q. Now, Mr. Plagemann, have you with you today the appraisal of the properties, of the land and buildings, by the American Appraisal Company of 1927? A. I have.

Q. You have delivered to me three volumes.

A. The first book is the summary.

Q. No. 1? A. That is No. 1.

Q. This is the summary, is that right?

A. That is the summary.

Mr. Scampini: I will offer this in evidence as

(Testimony of Walter O. H. Plagemann.)

the summary in lieu of two enormous volumes as the appraisal of the company's land and real estate in 1927, and ask that it be marked plaintiff's exhibit in order.

The Court: It may be admitted and marked.

(The volume was marked "Plaintiff's Exhibit 36.")

Mr. Scampini: Q. Now, in 1936 there was a report or an appraisal made of the company to be used in the reorganization proceeding by an engineer by the name of J. D. Galloway?

A. Yes.

Q. Have you that with you? A. Yes.

Mr. Naus: I do not think that appraisal properly describes this; it is more like an engineering analysis. I do not think it is an appraisal.

Mr. Scampini: It is an engineering appraisal by J. D. Galloway, civil engineer, under date of 1936, and it was delivered to the company, was it not, Mr. Plagemann, and used by [342] the company in connection with its reorganization proceeding under 77b before this court for the purpose of amending the bond indenture and getting the postponement of the bond payments; is that right?

A. Yes.

Mr. Scampini: I offer this in evidence as plaintiff's exhibit next in order for what it may be worth to the Court.

The Court: It may be admitted and marked.

(The document was marked "Plaintiff's Exhibit 37.")

(Testimony of Walter O. H. Plagemann.)

Mr. Scampini: Q. Now, Mr. Plagemann, as secretary of the company are you familiar with the transactions wherein and whereby the Allied Products Company was indebted to Merchants Ice & Cold Storage Company for a certain amount of money, and sometime in the year 1941 was that account paid by Allied Products Company by delivering to the company 500 shares of stock of Frostcraft Corporation?

A. It was delivered to Mr. Peter and Henri Bercut.

Q. What happened to the account?

A. The account was paid to the Merchants Ice & Cold Storage Company after Peter and Henri Bercut had delivered their check to the Allied Products Company.

Q. Then Allied Products Company delivered the check to Merchants Ice & Cold Storage Company?

A. Which was credited to accounts receivable.

Q. Then this block of stock, which I think aggregated 500 shares, was taken by you to Frostcraft Corporation, was it not?

A. As a representative of Peter and Henri Bercut.

Q. What did they say to you when they delivered it?

A. I asked them to transfer it into the name of Henri and Peter Bercut.

Q. Have you got custody of or are you familiar with an account showing advances to L. R. Arnold

(Testimony of Walter O. H. Plagemann.)

by the Merchants Ice & Cold [343] Storage Company? Have you got it with you?

A. I have.

Q. May I see it, please? A. Yes.

Q. Now, there have been handed to me certain ledger sheets entitled "Account No. 111, Lloyd Richard Arnold, Advances." Will you state what they are, Mr. Plagemann?

A. In July, 1939, there was an advance made to Mr. Arnold on account of his salary; prior to July 31, 1939, Mr. Arnold had drawn \$1,936.76.

Q. Did he continue to draw down money from the Merchants Ice & Cold Storage Company?

A. This money was transferred out of advance and given credit to him for his salary—this money that he had spent or advanced was wiped out by a journal entry, July 31, and charged up to his office salary.

Q. Thereafter did he continue to draw down any further advances?

A. During 1939 that was wiped out by an entry of December 31, 1939, crediting Mr. Arnold and charging Joseph McInerney.

Q. How much did he draw down from that?

A. \$1,156.44.

Q. What do you mean by charging Joseph McInerney? A. On the orders of Mr. Arnold.

Q. He told you to open an account receivable as due you from Joseph McInerney and you cleared up that account, is that right?

(Testimony of Walter O. H. Plagemann.)

A. Cleared up Mr. Arnold's advances. I cleared Mr. Arnold's account and charged Joseph McInerney.

Q. Did Mr. Joseph McInerney have any account?

A. That was on the orders of Mr. Arnold, president of the Merchants Ice & Cold Storage Company.

Q. Thereafter did he continue to draw down any money?

A. He did in 1940. He did not receive his salary check at one time, but he drew it as he wanted the money, and I charged it to his salary. Mr. Arnold gave me a check on December 31, 1940 [344] for \$1,562.80 all together with a credit discount for expenses which he had incurred, and he gave me vouchers for it, which were O.K. and audited by Mr. Heer. That cleaned up that account.

Q. How much was that account at that time? How much did he owe?

A. That was \$1,562.80.

The Court: If I follow the testimony, was that on the salary?

Mr. Scampini: Q. Was that an advance to him on his salary?

A. An advance of money he drew; his salary was charged against that, and he still owed \$1,562.80 after his salary was taken out of it.

Q. How was that paid off?

A. A check was given to me on December 31, 1940, and on January 1st or 2nd Mr. Arnold took

(Testimony of Walter O. H. Plagemann.)

that check back and charged it to the holding company.

Q. In other words, he gave you his check and took the check back and charged it to the holding company? A. Took it out again.

Q. Have you got the account in there for the holding company?

A. This is the 1939 suspense account of the holding company.

Q. What is that?

A. Money that was paid in advance to the holding company was put in this suspense account.

Q. During the year 1939 was there any money advanced to the holding company?

A. The balance at the end of 1939 was \$35,949.29.

Q. Owing to whom?

A. That was advanced to the holding company.

Q. Now, at the end of 1938 did the holding company owe any money to Merchants Ice & Cold Storage Company?

A. In 1938—there was no suspense account in 1938.

Q. Let us put it another way: At the end of 1938 did Merchants [345] Ice & Cold Storage Company owe money to the Pacific Empire Holdings?

A. In 1938 I am informed they owed the Pacific National Bank under the ice contract.

Q. Did they owe any money to the Pacific Empire, Inc.?

A. For money borrowed on the ice contract.

(Testimony of Walter O. H. Plagemann.)

Q. Can you state whether or not any of these advances which your records seem to indicate were money owing by the Pacific Empire Holdings were advances made by cash or check? A. Checks.

Q. To whom?

A. Made out to the Pacific Empire Holdings.

Q. Have you got any of those checks?

A. I have those checks.

Q. How much do those checks aggregate at the end of 1939?

A. \$46,999.29 were the charges against that account.

Q. What do you mean by charges?

A. That is the checks that were charged to that account less the \$11,050 which was entered at different times crediting different ledger accounts that we had in the general ledger pertaining to the holding company. For example, on January 31—pardon me; I have to change my testimony. I was looking at the 1940 ledger sheet. I will have to change that. In 1939 there was a debit balance of \$32,899.24 in this suspense account. It shows that they owed that. There was a journal entry clearing out that account.

Q. How was it cleared up?

The Court: What does the journal entry reflect?

The Witness: It reflects the clearing out of that account and charging in other accounts to dispose of this balance.

Mr. Scampini: Q. Was it ever actually paid off, this balance, or was it just shifted around?

A. It was shifted around from place to place. This was never paid up. It is still owing. [346]

(Testimony of Walter O. H. Plagemann.)

Q. I notice here there are a lot of items, 250, 250, 200, 200. What are those checks for?

A. Checks that were delivered to the holding company in the holding company's name.

Q. Did you deliver checks to Mr. Arnold or Mr. Maffei or Mr. Heer and charge them to the holding company?

A. No, they were always made out to the Pacific Holdings Company. At times Mr. Heer would receive a check in his own name and it was charged to salary. Mr. Maffei would receive his check and that was charged to old notes of 1935 and 1936 of the holding company.

Q. Whenever those individuals wanted any money they would go down to the Merchants Ice & Cold Storage Company and help themselves and shift the books around and charge it to this, that or the other?

A. Yes.

Q. That is the way they ran the Merchants Ice & Cold Storage Company?

A. Yes.

Mr. Scampini: That is all.

Mr. Naus: No questions.

The Court: We will take a recess now until two p. m.

(Thereupon a recess was taken until 2:00 p.m this date.) [347]

Thursday, May 6, 1943—2:00 P. M.

Mr. Scampini: Is there any objection to having admitted in evidence the exhibits which are marked for identification?

(Testimony of Walter O. H. Plagemann.)

Mr. Naus: I would like to know what particular ones they are.

Mr. Scampini: I now offer in evidence, may it please the Court, a copy of the auditor's report made as of June 4, 1940, for the period ending December 31, 1939, prepared by John F. Forbes & Company, which was examined by counsel on the other side during last evening.

Mr. Naus: No objection.

The Court: It may be admitted and marked.

PLAINTIFF'S EXHIBIT No. 38

JOHN F. FORBES & COMPANY

Certified Public *Accounts*

Crocker Building

San Francisco

June 4, 1940

Merchants Ice and Cold Storage Company

Battery and Lombard Streets

San Francisco, California

Dear Sirs:

We have examined the balance sheet of the Merchants Ice and Cold Storage Company as of December 31, 1939, and the statement of income and earned surplus for the year then ended, have reviewed the system of internal control and the accounting procedures of the company and, without making a detailed audit of the transactions, have examined or tested accounting records of the company and other

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

supporting evidence, by methods, at times, and to the extent we deemed appropriate.

We present our report consisting of the following financial statements and comments:

Exhibit

A—Balance Sheet, December 31, 1939.

B—Statement of Income and Earned Surplus for the Year ended December 31, 1939.

Plant, Property and Equipment

The plant property and equipment are recorded on the books at the September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation.

Land—\$865,608.55

Recording the land, site of the company's plant, at the September 1, 1927, appraised valuation thereof, \$865,300.00, resulted in a write-up of \$148,775.26, which latter amount is shown as surplus arising from appreciation.

Buildings, Machinery, and Equipment—
\$2,266,017.14

Reserve for Depreciation—\$1,262,709.17

During the year ended December 31, 1939, there was a decrease of \$74,852.67 in the depreciated book valuation of the plant buildings, machinery, and equipment as shown in the following summary:

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

	Plant Buildings, Machinery, and Equipment	Reserve for Depreciation	Depreciated Book Valuation
Amount, December 31, 1938.....	\$2,264,052.41	\$1,185,896.77	\$1,078,155.64
Add:			
1939 additions	3,117.23		
1939 provision for depreciation.....		73,632.36	
Provision for prior years' accumulated depreciation		3,236.47	
Total.....	\$2,267,169.64	\$1,262,765.60	
Deduct 1939 retirements and accrued depreciation thereon	1,157.50	56.43	
Amount, December 31, 1939.....	\$2,266,012.14	\$1,262,709.17	\$1,003,302.97

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Provision for depreciation for the year ended December 31, 1939, has been made at the composite rate of $3\frac{1}{4}\%$ per annum. This rate has been used by the company in making provision in preceding years and is the rate recommended by The American Appraisal Company in connection with its appraisal of the company's plant property and equipment as of September 1, 1927.

Real Estate (Acquired in Settlement of Accounts
With Acme Ice Cream Company)—\$27,922.42

This real estate, previously owned by the Acme Ice Cream Company in connection with the foreclosure sale. Pending appraisal, the real estate was recorded in the accounts at December 31, 1938, at the approximate assessed valuation of \$25,000.00 for the land and \$5,000.00 for the improvements. As of December 31, 1939, these original recorded valuations have been adjusted to reflect an appraised valuation determined by the General Appraisal Company as of May 15, 1940.

Title to the property is recorded in the name of Lloyd R. Arnold. We inspected an unrecorded indenture dated April 20, 1939, by which Mr. Arnold and his wife release and forever quitclaim the real estate unto the Merchants Ice and Cold Storage Company.

At date of acquisition the property was subject to a first mortgage thereon in the amount of \$13,500.00 payable to The Anglo California National

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Bank of San Francisco with interest at the rate of 6% per annum. Subsequent payments under the mortgage have reduced the amount of the principal indebtedness to \$12,100.00 as at December 31, 1938.

Investments in Securities (Cost or Nominal Valuation)—\$26,437.40

The securities owned at December 31, 1939, were as follows:

Pledged as collateral to first mortgage bonds:

Union Merchants Ice Delivery Company — 130 shares common capital stock of \$100.00 each.....	\$22,643.40
--	-------------

Appleton Investment Company—10 shares common capital stock of \$100.00 each.....	1,000.00
--	----------

Purity Spring Water Company—792 shares common capital stock of \$1.00 each.....	792.00
---	--------

Acme Ice Cream Company—2,500 shares common capital stock of \$100.00 each.....	1.00
--	------

National Ice and Cold Storage Company of California 3½%-6% gold bonds, due 1952—\$2,00.00 face value	2,000.00
--	----------

Pledged as collateral to mortgage payable—Bay Counties Land Company—1,499 shares common capital stock of \$1.00 each.....	1.00
---	------

Total.....	<u>\$26,437.40</u>
------------	--------------------

The securities were verified by certifications obtained from the trustee and mortgagee. Market quotations on the securities were not available as at December 31, 1939.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

The income recorded during the year ended December 31, 1939, with respect to the investments was as follows:

Union Merchants Ice Delivery Company.....	\$390.00
Appleton Investment Company.....	20.00
National Ice and Cold Storage Company of California	70.00
Total.....	<u>\$480.00</u>

Cash—\$6,415.57

The cash balances at December 31, 1939, consisted of the following:

Cash on deposit:

The Anglo California National Bank of	
San Francisco	\$ 415.99
Bank of America, N. T. & S. A.....	166.50
Pacific National Bank of San Francisco:	
General account	5,431.08
Trust Account #1.....	1.00
Trust Account #2.....	1.00
Total cash on deposit.....	<u>\$6,015.57</u>
Office fund	400.00
Total.....	<u>\$6,415.57</u>

The office fund was counted and found to consist of cash and vouchers. The cash on deposit was verified by reconciling the amounts with those shown on certifications received directly from the depositaries.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Note Receivable—\$1,503.18

The above amount represents the balance due on a note of Sgobel & Day Company.

We were informed by the attorney for Merchants Ice & Cold Storage Company that the affairs of Sgobel & Day Company are being administered by the Board of Trade and that in his opinion, a final liquidating dividend of not to exceed five per cent of the original indebtedness of \$1,803.86 may be expected. The reserve for doubtful note and accounts receivable includes a provision to cover the anticipated loss on this note.

Accounts Receivable

Customers (Approximately \$77,000.00 Pledged as Collateral to Notes Payable to Bank)—\$107,643.37

Following is a summary of the accounts receivable at December 31, 1939, classified as to age or periods of the charges:

Less than three months.....	\$ 45,250.39
Three to six months.....	40,486.95
Six months to one year.....	7,810.40
Over one year.....	14,095.63
Total.....	<u>\$107,643.37</u>

According to records, \$44,915.08 had been collected on the above accounts during the period from January 1, 1940, to March 31, 1940.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Certain customers whose accounts aggregated \$51,473.13 as of March 31, 1940, were requested to confirm the amounts shown as due from them at that date. With relatively minor exceptions, the debtors responding confirmed the amounts shown as due from them at March 31, 1940.

Other—\$9,497.85

The accounts receivable at December 31, 1939, included under this caption were as follows:

W. A. Sherman, Deceased.....	\$9,356.85
F. Maffei, stockholder and employee (advance , in 1931)	135.00
Dividend on two shares Union Merchants Ice Delivery Company capital stock.....	6.00
Total.....	<u>\$9,497.85</u>

Mr. W. A. Sherman resigned as president of the company in 1939. The net increase was \$2,580.09 for the year in the amount due from Mr. Sherman represents advances and charges aggregating \$4,785.09 less salary credits in the amount of \$2,205.00. We were informed that the amount due from the Estate of Mr. Sherman appears to be uncollectible.

The Supplemental Indenture dated April 26, 1937, issued in connection with the company's first mortgage serial bonds states in Article II, Section 8(b) that the company “* * * will not lend its credit or advance any of its funds to any of its sharehold-

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

ers, officers or employees, nor, without a majority of the entire board, including specifically the affirmative vote of the director representing the bondholders, to any other individual, firm or corporation whatsoever; * * *"

Reserve for Doubtful Accounts—\$26,500.00

The notes and accounts receivable were discussed as to collectibility with Mr. Lloyd R. Arnold, President, and from this discussion and the review of the accounts, it appears that the reserve of \$26,500.00 is adequate to provide for losses which may be sustained on the *nate* and accounts as at December 31, 1939.

Due From Globe Brewing Company

With Chattel Mortgage as Collateral Thereto—

\$12,365.02

This amount receivable arose during the year ended December 31, 1939, upon the assumption by the Merchants Ice and Cold Storage Company of its obligation as guarantor of an indebtedness of the Globe Brewing Company to the Acme Breweries. The amount receivable at December 31, 1939, is composed of the following items:

Payment to Acme Breweries made to	
December 31, 1939.....	\$ 8,688.33
Amount due Acme Breweries unpaid at	
December 31, 1939.....	2,476.69
Other expenditures to December 31, 1939.....	1,200.00
Total.....	<u><u>\$12,365.07</u></u>

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

In assuming its obligation, the Merchants Ice and Cold Storage Company acquired the rights of the Acme Breweries as mortgagee under a chattel mortgage on certain machinery and equipment executed by the Globe Brewing Company, as mortgagor. We were informed that subsequent to December 31, 1939, and the payment of the amount of \$2,476.69 due Acme Breweries, an assignment of the chattel mortgage was executed. In the opinion of officers of the company, the amount receivable will be realized in full upon the foreclosure and disposal of the mortgaged machinery and equipment.

Without Collateral—\$11,509.92

This is the amount of the receivable from the Globe Brewing Company arising from charges made prior to January 1, 1939. The receivable was reduced during the year ended December 31, 1939, by \$7,500.00, the estimated realizable value stated in the accounts of bottles and cases received from the debtor in partial settlement of its indebtedness.

Any loss which may be sustained on this account receivable is deemed to be provided for by the reserve for contingencies.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Unamortized Bond Discount and Expense,
and Reorganization Expense—\$32,578.90

These accounts for the year ended December 31,
1939, are summarized in the following:

	Balance, December 31, 1938	Amorti- zation, 1939	Balance, December 31, 1939
Bond discount and expense.....	\$16,177.63	\$1,904.91	\$14,272.72
Reorganization expense	20,749.41	2,443.23	18,306.18
Total.....	<u>\$36,927.04</u>	<u>\$4,348.14</u>	<u>\$32,578.90</u>

The balance is being amortized over the period to
the maturity of the first mortgage 6½% serial
bonds.

Commissions and Expenses on Preferred
Capital Stock—\$11,063.57

These expenditures and the amount thereof de-
ferred at December 31, 1939, are summarized as
follows:

Commissions and expenses paid in prior years in connection with the issuance of the com- pany's preferred capital stock.....	\$15,582.50
Less proportionate amount applicable to shares of the preferred stock reacquired by the company	4,518.93

Remainder—Deferred at December 31, 1939.....\$11,063.57

The amount written off was charged to surplus
arising from acquisition of preferred capital stock
at less than par value.

(Testimony of Walter O. H. Plagemann.)
 (Plaintiff's Exhibit No. 38—Continued)

First Mortgage 6½% Serial Bonds Maturing From
 April 1, 1942 to April 1, 1949—\$659,500.00

The amount of bonds outstanding at December 31, 1939, was verified by a certification obtained from the trustee.

The maturity dates of the bonds outstanding are as follows:

April 1, 1942.....	\$ 40,000.00
April 1, 1943.....	40,000.00
April 1, 1944.....	38,000.00
April 1, 1945.....	45,000.00
April 1, 1946.....	45,000.00
April 1, 1947.....	45,000.00
April 1, 1948.....	44,000.00
April 1, 1949.....	362,500.00
	<hr/>
	\$659,500.00
	<hr/>

Notes Payable to Bank—\$62,148.15

This indebtedness at December 31, 1939, was represented by notes with various maturities payable to the Pacific National Bank of San Francisco, with interest at the rate of 8% per annum. As collateral thereto accounts receivable aggregating approximately \$77,000.00 at December 31, 1939, were pledged.

We were informed that the Pacific Empire Corporation and Pacific Empire Holdings, Incorporated, jointly have executed a guarantee not to exceed \$50,000.00 with respect to loans obtained by

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

the company from the Pacific National Bank of San Francisco.

The amount of the indebtedness was confirmed by the bank.

Note Payable to Pacific Empire
Holdings, Incorporated

Section 2 of Article II of the Supplemental Indenture dated April 26, 1937, executed by the Merchants Ice and Cold Storage Company in connection with the reorganization of the company, provides as follows:

“The Company covenants and warrants that it has obtained from Pacific Empire Holdings, Inc. and Pacific Empire Corporation (the owners and holders of a majority of the outstanding common stock of the company) an agreement to the effect that, until such time as the Company shall have retired Bonds (exclusive of all bonds heretofore retired and Bonds now held in the treasury) having an aggregate principal amount equal to the aggregate principal amount of Bonds having original maturity dates on or prior to April 1, 1943, to-wit, \$297,000.00 of Bonds, they will look for the payment of the indebtedness now owing to them by the Company in the amount of \$36,750.00, secured by an assignment of all rentals and payments accruing to the Company under that certain lease dated April 28, 1936, between the Company, as

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

lessor, and Globe Brewing Company, as lessee, solely to such security, and that such agreement cannot be modified without the consent of the Trustee."

The changes during the year ended December 31, 1939 in the indebtedness of the Merchants Ice and Cold Storage Company to the Pacific Empire Corporation and Pacific Empire Holdings, Incorporated, are shown in the following summary:

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

	Portion Subordi- nated as Provided Under Section 2 of Article II of Supplemental Indenture	Remainder Not Sub- ordinated
Amount owed, December 31, 1938:		
Pacific Empire Corporation.....	\$23,048.64	
Pacific Empire Holdings, Incorporated.....	3,757.81	
Total.....	\$26,806.45	\$17,221.18
Add demand note dated December 29, 1939, payable to Pacific Empire Holdings, Incorporated, with interest at 6% per annum.....	\$35,000.00	
Total.....	\$61,806.45	
Deduct payments and advances made during 1939.....	41,301.91	
Amount owed, December 31, 1939.....	\$20,504.54	\$9,585.27
		\$10,919.27

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

To provide for the liquidation of the unsubordinated portion of the demand note dated December 29, 1939, and any additional loan or loans, the company on that date assigned to the Pacific Empire Holdings, Incorporated, all the amounts payable to the Merchants Ice and Cold Storage Company by The Union Ice Company under an agreement dated November 1, 1938.

In view of the provision for repayment contained in Section 2 of Article II of the Supplemental Indenture and the fact that the Globe Brewing Company is not in operation, the portion of the note subordinated has been excluded from current liabilities at December 31, 1939.

Miscellaneous Notes and Contracts Payable

The miscellaneous notes and contracts payable classified as a current liability at December 31, 1939, on the accompanying balance sheet were as follows:

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

	Date	Maturity	Interest Rate	Amount
C. C. Moore & Co.....	Various	Various	6%	\$3,909.96
Pacific States Cold Storage Warehousemen's Association	Apr. 1, 1928	Mar. 31, 1939	6%	1,375.00
First Bancredit Corporation.....	Various	Various		869.64
The Anglo California National Bank of San Francisco	Apr. 24, 1939	Various		704.00
Maurice A. Gale & Co.....	Dec. 8, 1939	Various	6%	684.00
Haskins & Sells.....	Oct. 9, 1939	Jan. 9, 1940	6%	509.74
Sunlite Corporation of California.....	Oct. 12, 1939	Various		353.42
Merwin, Holtgen & Fiora.....	Nov. 20, 1939	Various	6%	272.52
E. Masuccio	Nov. 1, 1934	Demand	6%	250.00
Tray-Holbrook	Nov. 16, 1939	Various	6%	151.48
Linda Stribolt	Feb. 10, 1927	30 days	7%	200.00
Total.....				<u>\$9,280.20</u>

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

In addition to the indebtedness shown above, the company is liable to C. C. Moore & Co. in respect of notes payable maturing after December 31, 1940, aggregating \$3,258.42. This amount is not shown as a current liability on the accompanying balance sheet.

Yours truly,

(Signed) JOHN F. FORBES & COMPANY

(Testimony of Walter O. H. Plagemann.)
(Plaintiff's Exhibit No. 38—Continued)

Exhibit A

MERCHANTS ICE AND COLD STORAGE COMPANY
(Incorporated in California)

BALANCE SHEET, DECEMBER 31, 1939
ASSETS

Plant Property and Equipment (September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation:		
Land	\$2,266,012.14	\$ 865,608.55
Buildings, Machinery and equipment.....	1,262,709.17	
Less reserve for depreciation.....		
Remainder—Depreciated book valuation.....		1,003,302.97
Plant property and equipment— Depreciated book valuation.....		\$1,868,911.52
Real Estate (acquired in settlement of accounts with Acme Ice Cream Company): Company as of May 15, 1940:		
Land	\$ 15,000.00	
Building—Depreciated valuation	12,922.42	
Total		27,922.42

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Investments in Securities (cost or nominal valuation—Market quotations at December 31, 1939, not available):		
Pledged as collateral to first mortgage bonds	\$ 26,436.40	
Pledged as collateral to mortgage payable	1.00	
		\$ 26,437.40
Total investments in securities		
Current Assets:		
Cash		
Note receivable		\$1,503.18
Accounts receivable:		
Customers (approximately \$77,000.00 pledged as collateral to notes payable to bank)	107,643.37	
Other (see Note 1)	9,497.85	
		\$118,644.40
Total		
Less reserve for doubtful note and accounts receivable	26,500.00	
Remainder		92,144.40
Bottles and cases held for sale (estimated realizable value)	7,500.00	
Total current assets		106,059.97

(Testimony of Walter O. H. Plagemann.)
(Plaintiff's Exhibit No. 38—Continued)

Due from Globe Brewing Company (see Note 2) :		
With chattel mortgage as collateral thereto.....	\$ 12,365.02	
Without collateral	11,509.92	
		\$ 23,874.94
Total due from Globe Brewing Company.....		
Deferred Charges		
Unamortized bond discount and expense and reorganization expense	\$ 32,578.90	
Commissions and expenses on preferred capital stock.....	11,063.57	
Taxes applicable to future period.....	10,672.34	
Insurance premiums—unexpired portion.....	5,077.89	
Other	379.55	
Total deferred charges.....		59,772.25
Total		<u>\$2,112,978.50</u>

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

LIABILITIES		
First Mortgage 6½% Serial Bonds, Maturing from April 1, 1942, to April 1, 1939:		
Authorized and originally issued.....	\$1,200,000.00	
Less redeemed and cancelled.....	540,500.00	
		\$ 659,500.00
Remainder—Outstanding.....		9,585.27
Due to Pacific Empire Holdings, Incorporated (see Note 3).....		12,100.00
Mortgage Payable on Other Real Estate.....		3,258.42
Notes Payable (installments maturing after one year).....		
Current Liabilities:		
Notes payable to bank—With customers accounts receivable pledged as collateral.....	\$ 62,148.15	
Other notes and contracts payable:		
Pacific Empire Holdings, Incorporated (see Note 4).....	10,919.27	
Miscellaneous.....	9,280.20	
Accounts Payable:		
Trade.....	19,565.35	
Taxes:		
Federal income and State franchise (including interest).....	5,863.17	
Property.....	23,297.83	
Other.....	9,613.79	
Accrued interest on bonds.....	10,716.87	
Due on purchase agreements for own preferred capital stock.....	975.00	
Other.....	8,004.24	
		160,383.37
Total Current Liabilities.....		15,000.00
Reserve for Contingencies (see Note 2).....		

(Testimony of Walter O. H. Plagemann.)
(Plaintiff's Exhibit No. 38—Continued)

Capital Stock (see Note 5):	
Preferred 7% Cumulative (78,332.5 shares of \$10.00 each; issued, 66,157.5 shares less 24,542.5 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of Calif. Outstanding, 41,615 shares.....	\$ 416,150.00
Common (authorized, 500,000 shares without par value; issued, 111,180 shares less 4,000 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California. Outstanding, 107,180 shares	999,575.00
Total Capital stock.....	\$1,415,725.00
Surplus (deficit in red):	
Arising from:	
Appreciation in value of land.....	\$ 148,775.26
Acquisition of preferred capital stock at less than par value..	79,387.85
Acquisition of common capital stock at less than par value..	4,632.19
Total	\$ 232,795.30
Earned (deficit in red), per Exhibit B.....	395,369.36*
Total surplus (deficit in red).....	162,574.06*
Total	\$2,112,978.50

*Denotes red figures.

Note: The notes appearing on the following page entitled "Foot-Notes to Balance Sheet, December 31, 1939" constitute an integral part of the above statement and should be read in conjunction therewith.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Merchants Ice and Cold Storage Company
FOOT-NOTES TO BALANCE SHEET,
DECEMBER 31, 1939

Note:

1. Accounts receivable—Other include \$9,356.85 due from Mr. W. A. Sherman, deceased, who had resigned as president of the company in 1939. The net increase of \$2,580.09 for the year ended December 31, 1939, in the amount receivable represents the excess of advances and charges over salary credits.
2. The Globe Brewing Company was not in operation at December 31, 1939. Any loss which may be sustained on the account receivable without collateral is deemed to be provided for by the reserve for contingencies.
3. The indebtedness to the Pacific Empire Holdings, Incorporated, excluded from current liabilities at December 31, 1939, is subordinated under the provision of Section 2 of Article II of the Supplemental Indenture dated April 26, 1937.
4. To provide for the liquidation of the current liability, the company assigned to the Pacific Empire Holdings, Incorporated all the amounts payable to the Merchants Ice and Cold Storage Company by The Union Ice Company under an agreement dated November 1, 1938.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

5. Payment of dividends on the cumulative preferred capital stock was discontinued on April 30, 1927, and such dividends were in arrears approximately \$369,000.00 at December 31, 1939. One of the provisions of the Supplemental Indenture, dated April 26, 1937, with respect to the company's first mortgage 6½% serial bonds, prohibits the payment of dividends on any class of its stock until such time as the company shall have retired bonds of the face amount of \$297,000.00, which is the amount of presently outstanding bonds having maturities from April 1, 1942 to April 1, 1948, as extended, pursuant to the Supplemental Indenture.
6. The company was contingently liable for notes receivable discounted in the amount of \$58,341.19.

Exhibit B

MERCHANTS ICE AND COLD STORAGE COMPANY STATEMENT OF INCOME AND EARNED SURPLUS FOR THE YEAR ENDED DECEMBER 31, 1939

Revenues:

Storage	\$310,063.73
Ice	60,495.45
Rent	10,161.89
Miscellaneous	5,683.79

Total Revenues	\$386,404.86
----------------------	--------------

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Expenses: (exclusive of provision for depreciation):

Executive Salaries	\$ 21,900.00
Office salaries	11,873.32
Other salaries and wages.....	120,139.63
Fuel, power and water.....	40,296.81
Maintenance and repairs—Materials	4,942.27
Miscellaneous plant operating expenses	2,914.51
Taxes	29,503.27
Solicitation, etc.—Entertainment, travel, and other.....	11,938.01
Insurance	7,382.36
Professional services	3,936.27
Stationery and printing and postage	2,459.81
Telephone and telegraph.....	2,412.70
Miscellaneous	5,168.98

Total	\$264,867.94
-------------	--------------

Profit from Operation Before Provision for

Depreciation	\$121,536.92
--------------------	--------------

Other Income Credits:

Dividends received	\$ 410.00
Interest earned	82.84

Total	492.84
-------------	--------

Gross Income Before Provision for Depreciation	\$122,029.76
--	--------------

Income Charges:

Bond interest	\$ 42,867.50
Other interest	13,437.83
Amortization of reorganization expense and bond discount and expense	4,348.14
Uncollectible accounts receivable.....	1,396.91
Miscellaneous	343.38

Total	62,393.76
-------------	-----------

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Net Income Before Provision for Depreciation.....	\$ 59,636.00
Provision for Depreciation.....	72,632.36
	<hr/>
Net Loss	\$ 13,996.36
Surplus Charges:	
Additional loss on acquisition of Acme	
Ice Cream Company Property.....	\$2,077.58
Provision for prior years' accumulated	
depreciation	3,236.47
Taxes applicable to prior year.....	639.28
	<hr/>
Total	5,953.33
	<hr/>
Gross Deficit for the Year.....	\$ 19,949.69
Surplus Credits—Miscellaneous items applicable	
to prior years.....	2,185.93
	<hr/>
Net Deficit for the Year.....	\$ 17,763.76
Deficit at Beginning of Year.....	377,605.60
	<hr/>
Deficit at End of Year.....	<u>\$395,369.36</u>

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
Plf's Ex. No. 38. Filed 5-6-43. Walter B. Maling,
Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Scampini: I now ask that Exhibits 2, 3, 4, 5 and 6 for identification be admitted in evidence.

Mr. Naus: If your Honor please, I am not disposed to make any objection to their admission, but I do not want to be understood as admitting the validity of them.

The Court: They may be admitted and marked.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibits 2, 3, 4, 5 and 6 for Identification were received in evidence.)

Mr. Scampini: I will ask that Plaintiff's Exhibit 13 be admitted in evidence.

Mr. Naus: I make the same comment as to the last offer. I am admitting nothing as to the validity of it.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 13 for Identification was received in evidence.)

Mr. Scampini: I will ask that Plaintiff's Exhibits 14, 16, 17, 18, 19 and 23 be admitted in evidence and marked. [348]

Mr. Naus: No objection.

The Court: Let them be admitted and marked.

(Plaintiff's Exhibits 14, 16, 17, 18, 19 and 23 for Identification were received in evidence.)

PLAINTIFF'S EXHIBIT No. 16

MERCHANTS ICE AND COLD STORAGE COMPANY

(Incorporated in California)

Lombard and Battery Streets

San Francisco, California

Aug. 4, 1939

To the Stockholders of

Merchants Ice and Cold Storage Company:

The Balance Sheet of the Company, as certified to by Messrs. Haskins & Sells, Certified Public Accountants, as of December 31, 1938, is herewith de-

(Testimony of Walter O. H. Plagemann.)

livered, accompanied by the Profit & Loss Statement with comparisons, showing the results of the operations for the annual period of 1938.

Respectfully submitted,

By Order of the Board of Directors,

L. R. ARNOLD

By: L. R. Arnold, President

HASKINS & SELLS

Alexander Building

Certified Public

155 Montgomery Street

Accountants

San Francisco

ACCOUNTANTS' CERTIFICATE

Merchants Ice and Cold Storage Company:

We have made an examination of your balance sheet as of December 31, 1938 and of the related statement of income and profit and loss deficit for the year 1938. In connection therewith, we made a review of the accounting methods and examined or tested accounting records of the Company and other supporting evidence in a manner and to the extent which we considered appropriate in view of the system of internal accounting control.

In our opinion, based upon our examination, the accompanying balance sheet and the related statement of income and profit and loss deficit with their footnotes, fairly present, in accordance with accepted principles of accounting consistently followed by the Company, its financial condition at December 31, 1938, and the results of its operations for the year ended that date.

HASKINS & SELLS.

April 24, 1939.

(Testimony of Walter O. H. Plagemann.)

MERCHANTS ICE AND COLD STORAGE COMPANY
(Incorporated in California)

BALANCE SHEET, DECEMBER 31, 1938

Assets

Property (value September 1, 1927, as determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book value):

Land	\$ 890,608.55
Buildings, machinery and equipment (less reserve for depreciation, \$1,185,957.71)	1,083,094.70

\$1,973,703.25

Total property—Depreciated value.....

Investments in Securities—Book value (market value not available; securities are pledged as collateral to first mortgage 6½% serial bonds and mortgage payable).....

26,437.40

19,009.92

Current Assets:

Cash	\$ 6,260.07
Notes receivable	\$ 1629.39

(Testimony of Walter O. H. Plagemann.)

Accounts receivable:			
Customers (pledged as collateral to notes payable to banks, approximately \$64,000) (see note 5).....	\$78,721.25		
Officer and employees.....	6,961.70		
	<hr/>		
Total notes and accounts receivable.....	\$87,312.34		
Less reserve for doubtful notes and accounts receivable	26,500.00		
	<hr/>		
Remainder	\$ 60,812.34	\$ 67,072.41	
	<hr/>		
Total current assets.....			
Deferred Charges:			
Unamortized reorganization expense and bond discount and expense		\$ 36,927.04	
Commissions and expenses on capital stock (see note 5).....		11,063.57	
Prepaid taxes		10,961.03	
Prepaid insurance		8,173.01	
Other		461.70	
	<hr/>		
Total deferred charges.....			67,586.35
			<hr/>
Total			\$2,153,809.33
			<hr/>

(Testimony of Walter O. H. Plagemann.)

Liabilities

Capital Stock (see note 3):

Preferred 7% cumulative (authorized, 78,332.5 shares of \$10.00 each; issued, 66,157.5 shares, less 24,542.5 shares acquired from stockholders under the provisions of Section 342(1) of General Corporation Law of the State of California—Outstanding, 41,615 shares).....

Common (authorized, 500,000 shares without par value; issued, 111,180 shares, less 4,000 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California—Outstanding, 107,180 shares)

\$ 416,150.00

Total capital stock.....

\$1,415,725.00

First Mortgage 6½% Serial Bonds, Maturing From April 1, 1942, to April 1, 1949:

Authorized and originally issued.....

\$1,200,000.00

Less redeemed and canceled.....

540,500.00

Remainder—Outstanding in hands of public.....

659,500.00

Mortgage Payable

13,300.00

Long-Term Instalment Notes Payable (portion maturing after 1 year)

8,038.02

Current Liabilities:

Notes payable to banks:

With collateral (customers' accounts receivable,

approximately \$64,000)

\$64,783.15

Without collateral (endorsed by Pacific Empire

Holdings, Incorporated)

15,000.00

\$ 79,783.15

(Testimony of Walter O. H. Plagemann.)

Notes payable to others:		
Pacific Empire Corporation.....	\$23,048.64	
Pacific Empire Holdings, Incorporated.....	3,757.81	
Miscellaneous	13,149.66	\$ 39,956.11
Accounts payable:		
Trade creditors	\$25,852.67	
Taxes (approximately \$11,300 delinquent).....	24,932.12	
Accrued interest on first mortgage bonds.....	10,716.87	
Other	5,615.69	67,117.35
Total current liabilities.....		186,856.61
Deferred Credits—Rental collected in advance.....		200.00
Reserve for Contingencies (see note 1).....		15,000.00
Surplus (deficit indicated by *) (see note 3):		
Arising from:		
Appreciation in value of land.....	\$ 148,775.26	
Acquisition of capital stock at less than par value.....	84,020.04	
Total	\$ 232,795.30	
Profit and loss (deficit indicated by *).....	* 377,605.60	
Total surplus (deficit indicated by *).....		* 144,810.30
Total		\$2,153,809.33

(Testimony of Walter O. H. Plagemann.)

Note:

1. At December 31, 1938, Globe Brewing Company was not in operation; any loss which may be sustained, however, in the ultimate realization of this receivable is deemed to be provided for by the reserve for contingencies.
2. The Supplemental Indenture, dated April 26, 1937, securing the first mortgage 6½% serial bonds contains, among other provisions, a prohibition against loans and advances to officers, employees, etc., from Company funds. The Company is also an accommodation endorser on note of Mr. Wm. A. Sherman, President (resigned subsequent to December 31, 1938) in the amount of \$2,500.00.
3. Payment of dividends on the cumulative preferred capital stock was discontinued on April 30, 1927, and such dividends were in arrears approximately \$340,000 at December 31, 1938. One of the provisions of the Supplemental Indenture, dated April 26, 1937, with respect to the Company's first mortgage 6½% serial bonds, prohibits the payment of dividends on any class of its stock until such time as the Company shall have retired bonds of the face amount of \$297,000.00, which is the amount of presently outstanding bonds having maturities from April 1, 1942, to April 1, 1948, as extended pursuant to the Supplemental Indenture.
4. The Company was contingently liable for notes

(Testimony of Walter O. H. Plagemann.)

receivable discounted in the amount of approximately \$67,000 at December 31, 1938; as such notes were received in connection with advances made on merchandise stored, the merchandise constitutes collateral to the advances.

5. During the year 1938 the Company made provision for anticipated losses not so provided for as at December 31, 1937, as stated in its annual report at that date: as to doubtful accounts receivable (see note 1) by charge-offs or reserves aggregating approximately \$31,000 (of which \$26,109.40 was charged to deficit account—see statement of income and profit and loss deficit) and as to advances to Acme Ice Cream Company by acquisition of improved San Francisco, California, real estate contiguous to its plants, subject to \$13,500.00 first mortgage thereon.

In this latter transaction the Company also acquired one-sixth of the capital stock of Bay Counties Land Company (pledged under the mortgage) which owns certain tide-lands in Alameda County, California. Pending appraisal to be made in 1939 the real estate has been recorded in the accounts at its approximate assessed value, \$30,000.00 and the capital stock at \$1.00 and the excess of the prior advances to Acme Ice Cream Company over such recorded values, amounting to \$35,798.61, was charged to deficit account (see statement of income and profit and loss deficit). Also during 1938 the

(Testimony of Walter O. H. Plagemann.)

Company wrote off, against surplus arising from acquisition of preferred capital stock at less than par value, the portion of its commissions and expenses incurred in connection with the original issue of its preferred stock applicable to shares of stock reacquired in prior years.

MERCHANTS ICE AND COLD STORAGE COMPANY

STATEMENT OF INCOME AND PROFIT AND LOSS DEFICIT
FOR THE YEARS ENDED DECEMBER 31, 1938 AND 1937, AND COMPARISON

	Year Ended December 31		Increase *Decrease
	1938	1937	
Revenues:			
Storage, ice and refrigeration.....	\$348,185.92	\$417,996.18	* \$ 69,810.26
Rent	10,805.00	10,990.00	* 185.00
Miscellaneous	5,677.08	7,111.60	* 1,434.52
Total	\$364,668.00	\$436,097.78	* \$ 71,429.78
Expenses (exclusive of provision for depreciation) :			
Executive salaries	\$ 13,755.00	\$ 17,170.00	* \$ 3,415.00
Other salaries and wages	132,548.44	144,503.91	* 11,955.47
Fuel and power	39,235.33	45,080.40	* 5,845.07
Taxes	27,042.36	26,125.73	916.63
Other plant operating expense	20,901.87	32,210.90	* 11,309.03
Loss and damage	5,068.97	5,797.30	* 728.33
Solicitation, etc.—Entertainment, travel, and other	4,694.90	17,134.19	* 12,439.29
Professional services	4,347.38	4,214.68	132.70
Miscellaneous general and administrative expenses	14,776.88	16,218.99	* 1,442.11
Total	\$262,371.13	\$308,456.10	* \$ 46,084.97

	Year Ended December 31 1938	1937	Increase •Decrease
Profit From Operations Before Provision for Depreciation.....	\$102,296.87	\$127,641.68	* \$ 25,344.81
Other Income Credits.....	192.74	1,344.00	* 1,151.26
Gross Income Before Provision for Depreciation.....	\$102,489.61	\$128,985.68	* \$ 26,496.07
Income Charges:			
Bond interest	\$ 42,867.50	\$ 42,802.49	\$ 65.01
Other interest	12,084.68	10,722.63	1,362.05
Amortization of reorganization expense and bond discount and expense	4,348.14	3,737.33	610.81
Uncollectible accounts receivable (less miscellaneous credits in 1938 of \$559.77) (see also additional provision in "Other Charges to Deficit Account")	20,952.22	7,280.05	13,672.17
Loss on sale of shares of stock of Merchants Ice Acceptance Corporation		380.50	* 380.50
Total	\$ 80,252.54	\$ 64,923.00	\$ 15,329.54

(Testimony of Walter O. H. Plagemann.)

	Year Ended December 31 1933	1937	Increase •Decrease *
Net Income Before Provision for Depreciation.....	\$ 22,237.07	\$ 64,062.68	* \$ 41,825.61
Provision for Depreciation.....	73,614.24	72,486.71	1,127.53
Net Loss for the Year.....	\$ 51,377.17	\$ 8,424.03	\$ 42,953.14
Other Charges to Deficit Account (see notes to accompanying balance sheet):			
Provision for uncollectible accounts applicable to prior years.....	\$ 26,109.40		\$ 26,109.40
Loss on acquisition of Acme Ice Cream Company property.....	35,798.61		35,798.61
Provision for contingencies.....	15,000.00		15,000.00
Total	\$ 76,908.01		\$ 76,908.01
Deficit for the Year.....	\$128,285.18	\$ 8,424.03	\$119,861.15
Profit and Loss Deficit at Beginning of Year.....	249,320.42	240,896.39	8,424.03
Profit and Loss Deficit at End of Year.....	\$377,605.60	\$249,320.42	\$128,285.18

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plif's Ex. No. 16. Filed 5-6-43.
Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Walter O. H. Plagemann.)

PLAINTIFF'S EXHIBIT No. 17

MERCHANTS ICE AND COLD STORAGE
COMPANY

(Incorporated in California)

Lombard and Battery Streets
San Francisco, California

June 15, 1940

To the Stockholders of

Merchants Ice and Cold Storage Company:

The Balance Sheet of the company, as certified to by Messrs. John F. Forbes and Company, Certified Public Accountants, as of December 31, 1939, is delivered herewith, accompanied by the Profit and Loss Statement, showing the result of the operation of the company for the year 1939.

Respectfully submitted,

By Order of the Board of Directors,

L. R. ARNOLD

By L. R. Arnold, President.

(Testimony of Walter O. H. Plagemann.)

Offices in
San Francisco
New York
Chicago
Los Angeles
Seattle

Crocker Building
San Francisco

JOHN F. FORBES & COMPANY
Certified Public Accountants

INDEPENDENT CERTIFIED PUBLIC
ACCOUNTANTS' OPINION

Merchants Ice and Cold Storage Company:

We have examined the balance sheet of the Merchants Ice and Cold Storage Company as of December 31, 1939, and the statement of income and earned surplus for the year ended that date, have reviewed the system of internal control and the accounting procedures of the company, and without making a detailed audit of the transactions, have examined or tested accounting records of the company and other supporting evidence, by methods, at times, and to the extent we deemed appropriate.

Provision for depreciation for the year ended December 31, 1939, has been made at the composite rate of $3\frac{1}{4}\%$ per annum. This rate has been used by the company in making provisions in preceding years and is the rate recommended by The Ameri-

(Testimony of Walter O. H. Plagemann.)

can Appraisal Company in connection with its appraisal of the company's plant property and equipment as of September 1, 1927.

In our opinion, the accompanying balance sheet and related statement of income and earned surplus, with notes thereon, present fairly the position of the Merchants Ice and Cold Storage Company at December 31, 1939, and the results of its operations for the year, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

JOHN F. FORBES & COMPANY.

San Francisco,

June 5, 1940.

(Testimony of Walter O. H. Plagemann.)

MERCHANTS ICE AND COLD STORAGE COMPANY
(Incorporated in California)

BALANCE SHEET, DECEMBER 31, 1939

Assets

Plant, Property and Equipment (September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation):

Land	\$ 865,608.55
Buildings, machinery and equipment.....	\$2,266,012.14
Less reserve for depreciation.....	1,262,709.17

Remainder—Depreciated book valuation.....	1,003,302.97
---	--------------

\$1,868,911.52

Plant property and equipment—Depreciated book valuation

Real Estate (acquired in settlement of accounts with Acme Ice Cream Company):

Valuation determined by General Appraisal Company as of May 15, 1940:

Land	\$ 15,000.00
Building—Depreciated valuation	12,922.42

Total 27,922.42

(Testimony of Walter O. H. Plagemann.)

Investments in Securities (cost or nominal valuation—Market quotations at December 31, 1939, not available):

Pledged as collateral to first mortgage bonds.....

\$ 26,436.40

Pledged as collateral to mortgage payable.....

1.00

Total investments in securities.....

\$ 26,437.40

Current Assets:

Cash

\$ 6,415.57

Note receivable

\$ 1,503.18

Accounts receivable:

Customers (approximately \$77,000.00 pledged as collateral to notes payable to bank).....

107,643.37

Other (see Note 1).....

9,497.85

Total

\$118,644.40

Less reserve for doubtful note and accounts receivable

26,500.00

Remainder

92,144.40

Bottles and cases held for sale (estimated realizable value).....

7,500.00

Total current assets.....

106,059.97

(Testimony of Walter O. H. Plagemann.)

Due From Globe Brewing Company (see Note 2) :			
With chattel mortgage as collateral thereto.....	\$	12,365.02	
Without collateral		11,509.92	
Total due from Globe Brewing Company.....	\$		23,874.94
Deferred Charges:			
Unamortized bond discount and expense and reorganization expense	\$	32,578.90	
Commissions and expenses on preferred capital stock.....		11,063.57	
Taxes applicable to future period.....		10,672.34	
Insurance premiums—unexpired portion.....		5,077.89	
Other		379.55	
Total deferred charges.....			59,772.25
Total			<u>\$2,112,978.50</u>

(Testimony of Walter O. H. Plagemann.)

Liabilities

First Mortgage 6½% Serial Bonds, Maturing From April 1, 1942, to April 1, 1949:

Authorized and originally issued.....
 Less redeemed and cancelled.....

\$1,200,000.00
 540,500.00

Remainder—Outstanding

Due to Pacific Empire Holdings, Incorporated (see Note 3).....
 Mortgage Payable on Other Real Estate.....
 Notes Payable (installments maturing after one year).....

\$659,500.00
 9,585.27
 12,100.00
 3,258.42

Current Liabilities:

Notes payable to bank—With customers' accounts receivable
 pledged as collateral.....
 Other notes and contracts payable:

\$ 62,148.15

Pacific Empire Holdings, Incorporated (see Note 4).....
 Miscellaneous

10,919.27
 9,280.20

Accounts payable:

Trade

19,565.35

Taxes:

Federal income and State franchise (including interest).....
 Property

5,863.17
 23,297.83

Other

9,613.79

Accrued interest on bonds.....

10,716.87

Due on purchase agreements for own preferred capital stock.....
 Other

975.00
 8,004.24

Total current liabilities.....

160,383.87

(Testimony of Walter O. H. Plagemann.)

Reserve for Contingencies (see Note 2).....	\$ 15,000.00
Capital Stock (see Note 5):	
Preferred 7% cumulative (78,332.5 shares of \$10.00 each; issued, 66,157.5 shares less 24,542.5 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California—Outstanding, 41,615 shares).....	\$ 416,150.00
Common (authorized, 500,000 shares without par value; issued, 111,180 shares less 4,000 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California—Outstanding, 107,180 shares)	999,575.00
Total capital stock.....	1,415,725.00
Surplus (deficit indicated by *):	
Arising from:	
Appreciation in value of land.....	\$ 148,775.26
Acquisition of preferred capital stock at less than par value	79,387.85
Acquisition of common capital stock at less than par value.....	4,632.19
Total	\$ 232,795.30
Earned (deficit indicated by *).....	* 395,369.36
Total surplus (deficit indicated by *).....	* 162,574.06
Total	<u><u>\$2,112,978.50</u></u>

(Testimony of Walter O. H. Plagemann.)

Note:

1. Accounts receivable—Other include \$9,356.85 due from Mr. W. A. Sherman, deceased, who had resigned as president of the company in 1939. The net increase of \$2,580.09 for the year ended December 31, 1939, in the amount receivable represents the excess of advances and charges over salary credits.
2. The Globe Brewing Company was not in operation at December 31, 1939. Any loss which may be sustained on the account receivable without collateral is deemed to be provided for by the reserve for contingencies.
3. The indebtedness to the Pacific Empire Holdings, Incorporated, excluded from current liabilities at December 31, 1939, is subordinated under the provision of Section 2 of Article II of the Supplemental Indenture dated April 26, 1937.
4. To provide for the liquidation of the current liability, the company assigned to the Pacific Empire Holdings, Incorporated, all the amounts payable to the Merchants Ice and Cold Storage Company by The Union Ice Company under an agreement dated November 1, 1938.
5. Payment of dividends on the cumulative preferred capital stock was discontinued on April 30, 1927, and such dividends were in arrears approximately \$369,000.00 at December 31, 1939. One of the provisions of the Supplemental

(Testimony of Walter O. H. Plagemann.)

Indenture, dated April 26, 1937, with respect to the company's first mortgage 6½% serial bonds, prohibits the payment of dividends on any class of its stock until such time as the company shall have retired bonds of the face amount of \$297,000.00, which is the amount of presently outstanding bonds having maturities from April 1, 1942, to April 1, 1948, as extended, pursuant to the Supplemental Indenture.

6. The company was contingently liable for notes receivable discounted in the amount of \$58,341.19.

MERCHANTS ICE AND COLD STORAGE COMPANY
STATEMENT OF INCOME AND EARNED SURPLUS
FOR THE YEAR ENDED DECEMBER 31, 1939

Revenues:

Storage, ice and refrigeration.....	\$380,721.07	
Miscellaneous	5,683.79	
	<hr/>	
Total revenues		\$386,404.86

Expenses (exclusive of provision for depreciation):

Executive salaries	\$ 21,900.00	
Other salaries and wages.....	132,012.95	
Fuel, power and water.....	40,296.81	
Taxes	29,503.27	
Other plant operating expense.....	7,856.78	
Solicitation, etc.—Entertainment, travel, and other.....	11,938.01	
Professional services	3,936.27	
Miscellaneous general and adminis- trative expenses	17,423.85	
	<hr/>	
Total		264,867.94

(Testimony of Walter O. H. Plagemann.)

Profit From Operations Before Provision for

Depreciation	\$121,536.92
Other Income Credits.....	492.84

Gross Income Before Provision for Depreciation... \$122,029.76

Income Charges:

Bond interest	\$ 42,867.50
Other interest	13,437.83
Amortization of reorganization ex- pense and bond discount and expense	4,348.14
Uncollectible accounts receivable.....	1,396.91
Miscellaneous	343.38
Total	62,393.76

Net Income Before Provision for Depreciation..... \$ 59,636.00

Provision for Depreciation..... 73,632.36

Net Loss \$ 13,996.36

Surplus Charges:

Additional loss on acquisition of Acme Ice Cream Company prop- erty	\$ 2,077.58
Provision for prior years' accumu- lated depreciation	3,236.47
Taxes applicable to prior year.....	639.28
Total	5,953.33

Gross Deficit for the Year..... \$ 19,949.69

Surplus Credits—Miscellaneous Items Applicable
to Prior Years..... 2,185.93

Net Deficit for the Year..... \$ 17,763.76

Deficit at Beginning of Year..... 377,605.60

Deficit at End of Year..... \$395,369.36

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22338R.
Plf's Ex. No. 17. Filed 5-6-43. Walter B. Maling,
Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Walter O. H. Plagemann.)

PLAINTIFF'S EXHIBIT No. 18

MERCHANTS ICE AND COLD STORAGE
COMPANY

Lombard and Battery Streets

Telephone GARfield 7644

San Francisco

February 19, 1942.

To the Stockholders of
Merchants Ice and Cold Storage Company:

This time last year, just prior to our annual stockholders' meeting, it was announced that a new leadership had assumed the management of your company. The announcement related certain facts concerning the caliber of the new leaders, and intimated that the inauguration of definite policies, which had been conceived and were to be developed would improve the financial position in a comparatively short period of time. Bearing in mind that the present officers have been directing the affairs of the company for a period of only eleven months of the year 1941, and based on preliminary results for the year, it appears that the predictions made at that time were rather well founded.

For the first time during the past ten years your company will show a net profit of somewhere in the neighborhood of \$5,000.00, compared to a net loss for the previous year of more than \$50,000.00.

For the first time in many years current assets

(Testimony of Walter O. H. Plagemann.)

exceed current liabilities. The ratio is by no means what is desired, but on the other hand, when it is considered the accounts payable at the beginning of last year stood well over \$30,000.00, compared to less than \$9,000.00 as at the close of the year, with a corresponding decrease in funds borrowed of approximately \$20,000.00, there is a clear indication of considerable progress.

Moreover, the fact that all taxes, interest on bonded indebtedness and other outstanding obligations were met promptly as they became due plus a reduction in funds borrowed denotes careful and economical operation.

While these accomplishments have undeniably strengthened the credit and improved the current position of the company the outlook for the present year is somewhat mixed. Operating costs of every description have increased tremendously, labor and materials in particular, with further increases in prospect. The present state of war, it is true, has increased the demand for cold storage occupancy, especially freezer space, (below zero temperatures). Unfortunately, the amount of freezer space, compared to cooler facilities (32 degrees to 40 degrees) is very limited, consequently heavy expenditures at a time when costs are soaring may be necessary for the purpose of making cooler rooms adaptable for sub-zero temperatures.

Furthermore, your company faces a severe drain upon its resources during the month of April of

(Testimony of Walter O. H. Plagemann.)

this year when the first maturity of bonds in the sum of \$40,000.00 must be retired, together with bond interest and taxes all becoming due at approximately the same time. In view of these circumstances operations for the year 1942 will demand the most watchful and skillful management that your officers are capable of rendering, challenging their abilities and energies to the utmost.

The formal notice of the annual stockholders' meeting to be held at the hour of 10:00 a. m. on Monday, the 2nd day of March, 1942, is herewith enclosed, with a Proxy and self-addressed reply card to be signed and returned in order that your stock will be represented at the meeting, in the event you are unable to attend in person.

The management urges your attendance at the meeting, in order that you may be fully informed concerning all matters pertaining to the operation of your company.

Respectfully yours,

BY ORDER OF THE BOARD OF
DIRECTORS,

PETER BER CUT, President.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22338. Plfs. Ex. No. 18. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Walter O. H. Plagemann.)

PLAINTIFF'S EXHIBIT No. 19

MERCHANTS ICE AND COLD STORAGE
COMPANY

Lombard and Battery Streets
Telephone GARfield 7644
San Francisco

February 19, 1941.

To the Stockholders of
Merchants Ice and Cold Storage Company:

On February 1st of this year your Board of Directors elected a new President and Vice President to direct the affairs of your company in the future. This new leadership is composed of two brothers, namely, Peter and Henri Bercut, whose record for successful management is well known, not only in the State of California, but throughout the entire country. In addition to being the chief executive of your company the new leader is actively the President of the following corporations:

The English Estate Co.: Owning and operating land, orchards and cannery site adjacent to the City of Sacramento;

The Bercut-Richards Packing Co.: One of the largest packers of fruits and vegetables in the state.

The Markets Investment Co.: Owners and lessors of land and market properties.

(Testimony of Walter O. H. Plagemann.)

The San Francisco City Calf Skin Co.: Specializing in the selection and cure of calfskins and hides.

Bercut Bros. Co.: Operating the Grant Market, in the City of San Francisco, whose volume of business at this location, according to some authorities is not exceeded at any other individual establishment elsewhere in the United States.

The two brothers also own and operate extensive apartment house properties in this city and serve as directors in various associations and institutions.

Their financial stability, their close contacts with the growers, producers, processors and packers of food products are ideally suited to strengthen and utilize the capacities of your properties.

Upon his election, the new president outlined briefly his aims and ambitions. His initial action based on a naturally limited exploration of the operations of your company was to effect substantial savings in interest rates and other fixed charges. Administrative salaries were considerably reduced. Moreover, he made a declaration that until such time as the financial position of the company warranted it, he did not propose to draw any salary for his services.

With the co-operation of your Board of Directors, the personnel of your organization, your preferred creditors, the bondholders, and the good-will of your many valued customers, he expressed profound con-

(Testimony of Walter O. H. Plagemann.)

fidence and utmost faith that the financial statements of your company will show a marked improvement in a comparatively short period of time.

The formal notice of the annual stockholders' meeting to be held at the hour of 10:00 a.m. on Monday, the 3rd day of March, 1941, is herewith enclosed, with a Proxy and self-addressed reply card to be signed and returned in order that your stock will be represented at the meeting, in the event you are unable to attend in person.

The management urges your attendance at the meeting, in order that you may be fully informed concerning all matters pertaining to the operation of your company.

Respectfully yours,

BY ORDER OF THE BOARD OF
DIRECTORS,

PETER BERGUT, President.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22338R. Plfs. Ex. No. 19. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 23

MERCHANTS ICE AND COLD STORAGE COMPANY

SCHEDULE OF EXPENSE

	1936	1937	1938	1939
Total Operating Revenue.....	\$353,321.28	\$437,023.65	\$363,879.42	\$392,076.81
Operating Expense:				
Warehouse Labor	\$ 75,902.51	\$ 96,866.41	\$ 81,712.17	\$ 90,859.68
Engine Room Labor.....	28,310.26	33,628.35	31,146.67	32,016.28
Power, Light & Water.....	45,443.98	47,668.93	41,136.78	40,297.10
Maintenance & Repairs.....	7,439.16	10,924.67	6,863.16	7,779.90
Ammonia		915.24	963.33	
Taxes	19,795.48	20,147.40	20,615.54	20,569.32
Capital Stock Taxes.....	275.00			
Unemp. Res. Payroll Taxes.....	1,300.40	3,190.49	4,573.25	4,729.42
Social Security Taxes.....	144.49	1,963.67	1,374.29	1,467.15
Insurance	8,712.89	10,630.05	9,089.45	8,495.21
Salaries: Officers & Clerks.....	29,243.59	30,946.02	32,536.79	32,531.59
Rent	900.00	900.00	525.00	900.00
Cartage, Loss & Damage, Uncollectible Accounts	31,687.51	11,396.35	3,061.10	301.49
Tariff Adjustments				5,129.57
Total Operating Expense	\$249,155.27	\$269,177.88	\$233,597.53	\$245,076.71

Peter Bercut, et al.

577

(Testimony of Walter O. H. Plagemann.)

(Testimony of Walter O. H. Plagemann.)

	1936	1937	1938	1939
Administration Expense:				
Soliciting	\$ 5,637.00	\$ 5,668.32	\$ 3,974.57	\$ 3,089.53
Automobile Expense	5,933.58	5,265.06	1,428.77	727.54
Officers Expense	4,009.55	2,934.98	1,490.50	1,539.45
Legal Expense	3,594.66	2,649.97	2,400.00	2,520.00
Advertising	939.63	515.69	399.49	30.00
Donations	863.32	202.00	152.00	107.50
Telephone & Telegraph	2,338.88	2,527.65	2,405.56	2,412.70
Postage	512.79	652.27	607.09	611.19
Supplies, Stationery	3,281.98	3,247.99	2,699.08	1,860.36
Auditors	1,238.89	1,564.71	1,549.74	1,200.00
Miscellaneous, Sundries	11,818.34	7,549.87	2,304.12	3,231.36
Dues & Subscriptions	4,754.70	1,787.81	699.38	1,619.44
Misc. General Expense	1,040.43	1,643.62	2,112.16	2,866.16
Total Administration Expense	\$ 45,963.74	\$ 36,200.94	\$ 22,222.46	\$ 21,815.23
Total Expense	\$295,119.01	\$305,378.82	\$255,819.99	\$266,891.94
Net Operating Profit	\$ 58,202.27	\$131,644.83	\$108,059.43	\$125,184.87

(Testimony of Walter O. H. Plagemann.)

	1936	1937	1938	1939
Other Income Credits:				
Interest	\$ 722.38	\$ 639.85	\$ 152.74	\$ 47.84
Dividends	110.00	1,344.00	95.71	1,459.34
Total	<u>\$ 832.38</u>	<u>\$ 1,983.85</u>	<u>\$ 248.45</u>	<u>\$ 1,507.18</u>
Gross Income	\$ 59,034.65	\$133,628.68	\$108,307.88	\$126,692.05
Other Income Charges:				
Bond Interest	\$ 43,582.52	\$ 42,802.49	\$ 42,867.50	\$ 42,867.50
Other Interest	9,889.02	10,638.79	10,714.05	10,562.78
2% on Bonds	614.90	619.13		
Profit & Loss	4,923.21	137.12		
Total	<u>\$ 59,009.65</u>	<u>\$ 54,197.53</u>	<u>\$ 53,581.55</u>	<u>\$ 53,430.28</u>
Net Profit Before Depreciation	\$ 25.00	\$ 79,431.15	\$ 54,726.33	\$ 73,261.77

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plf's Ex. No. 23. Filed 5-6-43.
Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Scampini: We submit the plaintiff's case.

F. C. WHITE,

called for defendants; sworn.

Direct Examination

Mr. Brownstone: Q. Mr. White, with what firm are you associated at the present time?

A. National Quotation Bureau.

Q. How long have you been associated with that firm? A. Eighteen years.

Q. What is your position with the firm at the present time? A. Pacific Coast manager.

Q. Will you state generally to the Court what business the National Quotation Bureau engages in.

A. Our function, our primary function, is to create the medium for dealers for the exchange of accurate purchase and sale orders with each other, and in so doing we publish a trade service.

Q. Does that trade service set forth the bid and ask price for various unlisted securities?

A. Yes, it does.

Q. From whom do you get the information from which these service reports are made?

A. All of our information comes from the dealers themselves, from our customers.

Q. If a dealer in unlisted securities makes a bid for a certain security in the market, he forwards that bid to you and you enter that bid in your trade service? A. That is right.

Q. Similarly, if he has any securities for sale he forwards the price at which he is willing to sell, and you print that [349] in your report?

(Testimony of F. C. White.)

A. Yes, that is correct.

Q. Are the records that you compile used and relied upon by dealers in the unlisted market, that is, either the bid or asked price for the securities set forth in these reports?

A. I think it is generally conceded that they are.

Q. Now, in response to our request you have brought with you, have you not, your records dealing with Merchants Ice & Cold Storage securities for a certain period?

A. Yes.

Q. Now, preliminarily, your reports are published in bound form semiannually, are they not?

A. Yes. After the reporting of the quotations they are subsequently recorded in publications which are issued monthly.

The Court: Q. Do you have a daily service?

A. We publish a daily service, your Honor.

Mr. Brownstone: Q. Will you produce for us, Mr. White, your report on the common and preferred shares of Merchants Ice & Cold Storage Company for the month of January, 1941.

A. This will cover up to January 10.

Q. Mr. White, you have produced in response to my question the National Monthly Stock Summary, issue of January 10, 1941, and I will ask you to turn to the page which will reflect bid and ask prices on Merchants Ice & Cold Storage common and preferred shares.

A. Yes, I have it.

Q. Will you read into the record, Mr. White—

The Court: What page, for the record? Identify the page.

(Testimony of F. C. White.)

The Witness: 695.

Mr. Brownstone: Q. You are now reading from page 695 of the National Monthly Stock Summary, issue of January 10, 1941, with respect to the bid and ask prices on Merchants Ice & Cold Storage Company common and preferred shares?

A. Yes. [350]

Q. Will you read that into the record.

A. Do you wish the complete record of preferred and common shares?

Q. Yes.

A. With regard to the bid and asked price and the date?

Q. Yes. A. January 4, 1941, 11½ bid.

Q. For preferred shares?

A. On the preferred.

Q. What firm bid that?

A. Stephenson Leydecker & Company of San Francisco.

Q. Is that a brokerage firm in San Francisco?

A. Their office is now closed; they are in Oakland.

Q. \$1.50 a share? A. \$1.50.

Q. Will you continue reading?

A. On January 8, 1941, \$1 bid by Shaw Hooker & Company.

The Court: Q. Are those for preferred?

A. Those are preferred. In this particular issue there is no quotation on the common, subsequent to November 1, 1940.

(Testimony of F. C. White.)

Mr. Brownstone: Q. What quotation is shown as of November 1, 1940, for the common?

A. 10 cents bid, offered at $\frac{3}{4}$.

Q. Offered at $\frac{3}{4}$? A. Yes.

Q. Now, you referred to Stephenson Leydecker & Company bid of $1\frac{1}{2}$ on 100 1-4-41; Shaw Hooker & Company on 1-8-41, 100 shares at \$1. The record also shows a bid of Ellworthy & Co. as of 11-1-40 at \$1, and it also reflects a bid of Hansford & Talbot as of 12-2-40 of 100 shares at \$1.50. A. Yes.

Q. Will you tell me what the preferred shares were offered at there?

A. Well, the quotation of November 1, 1940, shows \$1 bid, offered at \$2.

Q. I show you now the National Monthly Stock Summary, issue of December 10, 1940, and call your attention to page 594, reflecting bid and ask prices on Merchants Ice & Cold Storage [351] Company of San Francisco, par \$10 on preferred and also on the common, and I ask you to state from the page the name of the firm, the date, the amount of the bid and the number of shares on the preferred and common on November 1, 1940.

A. Ellworthy & Company, \$1 bid, offered at \$2.

Q. Preferred or common?

A. This was preferred. On December 2, 1940, Hansford & Talbot of San Francisco bid $1\frac{1}{2}$.

Q. For how many shares?

A. For 100 shares.

Q. Preferred?

(Testimony of F. C. White.)

A. Preferred. On December 6, 1940, Shaw Hooker & Company of San Francisco bid $11\frac{1}{4}$ for 100 shares.

Q. What is the bid for the common as reflected in that report?

A. The bid on the common is identical with the one given previously as of November 1, 1940, of 10 cents bid, offered at $\frac{3}{4}$, Ellworthy & Company.

Mr. Scampini: Q. For how many shares?

A. There is no amount given.

Mr. Brownstone: Q. Now, Mr. White, in addition to publishing special reports concerning the bid and ask prices on stocks, do you also publish official reports reflecting the bid and ask prices on unlisted bonds? A. Yes, we do.

Q. I show you what purports to be the National Quotation Bond Summary, issue of December 1, 1940, published by National Quotation Bureau, and calling your attention to page 544, I will ask you to read into the record the bid prices and asked prices for Merchants Ice & Cold Storage Company of San Francisco $61\frac{1}{2}$ bonds with the name of the brokers.

A. On July 28, 1940, Stephenson Leydecker & Company of San Francisco bid 78 for five bonds. On August 6, 1940, F. M. Brown & Company of San Francisco offered two bonds at 82. On August 12, 1940, Golboff & Hess of San Francisco offered five [352] bonds at 86. August 29, 1940, Hansford & Talbot of San Francisco bid 76 and offered at 79 five bonds. On August 30, 1940, F. H. Junger &

(Testimony of F. C. White.)

Company, New York, bid 79. On October 30, 1940, Ellworthy & Company, San Francisco, offered one bond at 75. On January 26, 1940, Shafft, Snook & Cahn bid 65 and offered at 70 five bonds. On November 28, 1940, Shaw Hooker & Company of San Francisco bid 70 for two bonds.

Q. Mr. White, I now wish you would come back to the stock of this corporation. I show you the National Stock Summary in bound form of April, 1940, and call your attention to page 1773, and I will ask you to give us the names of the firms, the date of the bid, the amount bid, and the price of the bid for Merchants Ice & Cold Storage Company preferred and common shares.

A. On the preferred on December 1, 1939, F. M. Brown & Company of San Francisco bid \$1 for 100 shares. January 2, 1940, Ellworthy & Company of San Francisco bid \$1.15. On January 6, 1940, Chapman & Company of San Francisco bid \$1.25 for 500 shares. February 5, 1940, Shaw Hooker & Company of San Francisco bid $1\frac{1}{8}$ for 500 shares. February 6, 1940, Frank Wilson & Company of San Francisco bid $1\frac{1}{4}$ for 500 shares. On April 2, 1940, Hansford Talbot of San Francisco bid \$1.25 for 100 shares.

Q. Those were all preferred shares?

A. Those were all preferred. On the common on March 16, 1940, Ellworthy & Company of San Francisco bid 10 cents for 1,000 shares.

Q. Mr. White, now let me show you what pur-

(Testimony of F. C. White.)

ports to be the National Stock Summary, bound volume, issue of April, 1941, and call your attention to page 1677, and I will ask you to give us the name of the brokers, the date of the bid, the amount of the bid, and the price at which the common and preferred shares were bid for and offered as set forth in that summary. [353]

A. On December 2, 1940, Hansford Talbot of San Francisco bid $1\frac{1}{2}$ for 100 shares.

The Court: Q. That is for preferred?

A. Yes, these are preferred share quotations. On February 10, 1941, F. M. Brown & Company of San Francisco bid $1\frac{1}{2}$ for 1,000 shares. March 3, 1941, Elworthy & Company of San Francisco bid $1\frac{1}{2}$, offered at $2\frac{1}{2}$. April 5, 1941 Stephenson Ley-decker & Company of San Francisco bid $1\frac{1}{2}$ for 100 shares. On April 7, 1941, Shaw Hooker & Company bid $1\frac{1}{2}$ for 500 shares. On the common on April 3, 1941, Elworth & Company of San Francisco bid 40 cents for 500 shares. That is all.

Mr. Brownstone: Q. Mr. White, I now show you the National Stock Summary bound edition for April, 1942, and call your attention to page 1618. Will you give the same information from that page as you have just given with respect to Merchants Ice & Cold Storage Company.

A. On the preferred, January 28, 1942, Wilson & Company of San Francisco bid \$2 for 200 shares. On March 21, 1942, Elworthy & Company of San Francisco, \$2 bid for 100 shares. April 2, 1942,

(Testimony of F. C. White.)

F. M. Brown & Company of San Francisco, \$2 bid for 500 shares. On April 4, 1942, Lewis & Broy Company of San Francisco, \$2 bid for 1,000 shares. On April 7, 1942, Schafft, Snook & Cahn of San Francisco, \$2.50 for 500 shares, and on the same day Stephenson Leydecker & Company of San Francisco, \$2 for 100 shares.

Q. That is all preferred?

A. Yes. On January 6, 1942, Shaw Hooker & Company of San Francisco, 50 cents bid for 1,000 shares. February 5, 1942, Monasch & Company of San Francisco, 25 cents bid for 500 shares. March 2, 1942, Elworthy & Company of San Francisco, 50 cents a share. On April 2, 1942, F. M. Brown & Company of San Francisco, 50 cents bid for 1,000 shares, [354] and on the 7th of April, 1942, Schafft, Snook & Cahn, 50 cents bid for 500 shares. That is all.

Q. I show you now, Mr. White, the National Quotation Bond Summary, bound issue of January, 1941, and call your attention to page 1285 of that book. Will you be kind enough to give us the same information relative to the bid and asked prices for the 6½ per cent bonds.

A. Some of these may be duplications. August 12, 1940, Schafft, Snook & Cahn, San Francisco, offered 5 bonds at 86. August 30, 1940, Junger & Company, New York, 79 bid. October 30, 1940, Elworthy & Company, San Francisco, offered one bond at 75. January 26, 1940, Schaffner & Company

(Testimony of F. C. White.)

of San Francisco, 65 bid, offered at 70, 5 bonds. On December 21, 1940, Monett & Company of San Francisco bid 60½ for 3 bonds. On December 24, 1940, F. M. Brown & Company, 65 bid, offered at 70, 5 bonds. On December 26, 1940, Hansford & Talbot, San Francisco, 3 bonds, 65 bid, 2 bonds offered at 70. December 27, 1940, Shaw Hooker & Company, San Francisco, 3 bonds, 68½ bid. December 28, 1940, Stephenson Leydecker & Company, San Francisco, 65 bid, offered at 70. February 23, 1940, Shaw Hooker & Company of San Francisco, 80½ bid for 2 bonds.

Q. That is February, 1940? A. Yes.

Q. The others were as of December, 1940, and the last one was as of February, is that correct?

A. Yes.

Mr. Brownstone: I think that is all.

Cross Examination

Mr. Scampini: Q. Just a few questions, Mr. White. You don't know anything yourself about these asked and bid prices, do you? A. No.

Q. You just know what you read in the book about it? [355] A. That is right.

Q. Does it necessarily reflect the reasonable value of the block of stock constituting more than 60 per cent of the outstanding issue of the company merely because somebody makes a bid for 100 shares?

A. I do not think I am qualified to answer that question.

Mr. Scampini: No further questions.

L. J. SPULLER, JR.,

called for defendants; sworn.

Direct Examination

Mr. Brownstone: Q. Mr. Spuller, with what firm are you associated?

A. Elworthy & Company.

Q. Is that a corporation? A. Yes.

Q. What position do you occupy?

A. Manager of their trading department.

Q. Does that corporation deal mainly in unlisted securities on the San Francisco market?

A. Yes.

Q. In response to our subpoena have you brought with you a record of the dealings of your corporation in preferred and common stock shares of the Merchants Ice & Cold Storage Company, a California corporation, and the 6½ bonds of that corporation during the year 1939 and 1940? A. Yes.

Q. Will you produce the records of the year 1940?

A. Yes. There are several years in one sheet.

Q. Are what you are now examining part of the official records of your company? A. Yes.

Q. And you use those records in the regular course of your business? A. Yes.

Q. They reflect the transactions at the time in your office? [356] A. Yes.

Q. From an examination of those records will you tell us what transactions were had by Elworthy & Company in preferred shares of Merchants Ice & Cold Storage Company during 1940?

(Testimony of L. J. Spuller, Jr.)

A. There were none in 1940.

Q. You say no transactions whatsoever in preferred shares of Merchants Ice & Cold Storage Company during 1940? A. No.

Q. How about during the year 1939?

A. Yes.

Q. Will you tell us the price of those securities?

A. November 15, 1939, there were 30 shares paid $11\frac{1}{4}$.

Q. Was that purchased or sold?

A. Sold. We acted as broker.

Q. What other transaction?

A. That was all in 1939.

Q. Going to the year 1941 what transactions did you have in preferred? A. None.

Q. None in the year 1941?

A. No, not preferred.

Q. Going to the common shares, were there any transactions in 1939?

A. Yes. On November 15 there were 210 shares at the price of $121\frac{1}{2}$ cents.

Q. $121\frac{1}{2}$ cents a share? A. Yes.

Q. Is that the sole transaction in 1939?

A. Yes.

Q. How about 1940?

A. 1940, March 14, 120 shares at 15 cents.

Q. Is that the sole transaction in 1940?

A. Yes.

Q. What transactions were had during 1941?

(Testimony of L. J. Spuller, Jr.)

A. April 1, 426 shares at 50 cents.

Q. April 1, 1941? A. Yes.

Q. Any other transaction? A. No.

Q. Now, going to the 6½ per cent bonds of Merchants Ice & Cold Storage Company, give the transactions in bonds had by Elworthy & Company for the year 1939. A. There were none.

Q. None in 1939? A. No. [357]

Q. Go to the year 1940. What transactions were had in 1940?

A. February 2, there were trades at 80 and 81.

Q. How many bonds were traded at that price?

A. 1,000. On October 23, 1,000 at 69 and 71.

Q. Purchased at 69 and sold at 71?

A. Yes.

Q. In other words, 2 points difference between the purchase and sale price?

A. Yes. That is all for 1940.

Q. How about 1941? A. There was none.

Q. No transactions at all in 1941?

A. No.

Cross Examination

Mr. Scampini: Q. Will you please state how many years of experience you have had in the trading department of an unlisted security house?

A. Since 1925.

Q. Have you always been associated with the same firm? A. The same firm since 1931.

Q. How long have you been with this firm?

A. Since the inception.

(Testimony of L. J. Spuller, Jr.)

Q. So you are acquainted with these particular transactions concerning which you have testified, are you? A. Yes.

Q. Now, in your experience as a trader in stock—as a result of years of training and experience can you state whether or not an occasional transaction of 100 shares or 200 shares of stock such as you have shown from your records necessarily reflects, in your opinion, the true reasonable intrinsic value of a block of stock representing more than 50 per cent of the outstanding capital stock and therefore carrying with it control of the company?

A. I could not say as to that, but I would say it represents the market at the time

Q. Does it reflect the market, or what somebody is willing to pay for 65,000 shares of stock, or what the true intrinsic [358] value of a block of more than 50 per cent of the shares?

A. I could not answer that.

Q. Is it not true that whenever stock is exclusively held by say one concern and only a few shares outstanding in the hands of the public, that the market for the publicly owned stock is generally very thin? A. Yes.

Q. And the bid and ask price sometimes has no relation to the true reasonable value of the stock, has it? A. It could be.

Q. Between what customers did these transactions that you have testified to take place that took

(Testimony of L. J. Spuller, Jr.)

place on November 15, 1939, I think, at 12½ cents?

Who bought that stock?

A. Lewis & Broy.

Q. Who are they?

A. A brokerage house.

Q. How about the next block in 1940?

A. The Pacific Empire Holdings.

Mr. Scampini: No further questions.

W. G. EVANS,

recalled for defendants; previously sworn.

Direct Examination

Mr. Naus: Q. Mr. Evans, you have been connected in business for many years with Mr. Henri and Peter Bercut, haven't you? Continuously since when? A. Since December, 1924.

Q. And you have had experience as an accountant and as an officer, have you? A. Yes.

Q. Trained as such? A. Yes.

Q. State to what extent you have had connection with the business affairs of Peter and Henri Bercut generally during that period of time.

A. Well, I *have an* assistant to Peter Bercut in the management of his affairs. [359]

Q. Have you charge of his personal records and accounts and his affairs generally?

A. Personally, yes.

(Testimony of W. G. Evans.)

Q. Along about February 1941 you became associated with the Merchants Ice & Cold Storage Company, did you? A. Yes.

Q. Mr. Bercut put you in there? A. Yes.

Q. What has been your connection with Merchants Ice & Cold Storage Company since February 1941? A. I have been manager.

Q. At the time you took charge did you take charge of the records and accounts of the company?

A. All that we have there at the office, yes.

Q. Have they been under your supervision?

A. Yes.

Q. Mr. Plagemann attends to the keeping of the accounts but under your supervision as manager?

A. Yes.

Q. You are familiar with those accounts?

A. Yes.

Q. Examine and study them from time to time?

A. Yes.

Q. Now, from time to time as Mr. Peter and Henri Bercut purchased stock and securities you kept a record of the purchases, didn't you?

A. Yes.

Q. At my request have you brought the details of the purchases of Merchants Ice & Cold Storage stock by Peter and Henri Bercut? A. Yes.

Q. Other than this stock bought on January 8, 1941? A. Yes.

Q. Now, will you state the date, quantity and price of the purchases of Merchants Ice & Cold

(Testimony of W. G. Evans.)

Storage Company stock by the Bercuts other than the purchase on January 8, 1941 from the Pacific Empire Holdings.

A. January 20, 1940, from Anthony De Voto, 800 shares of common stock at 50 cents a share.

Q. Next?

A. February 17, 1940, Schwabacher, 100 shares of preferred at \$1.75 a share.

Q. Next?

A. November 2, 1940, Hansford & Talbot, 250 shares [360] at \$1.75 per share.

Q. Next?

A. December 19, 1940, Lewis & Broy, 250 shares of preferred at \$1.50 per share.

Q. Next?

A. June 30, 1941, H. R. Baker & Company, 400 shares of common at 50 cents a share.

Q. Next?

A. April 3, 1941, Elworthy & Company 426 shares of common at 50 cents a share. April no date, M. Maffei, 400 shares of common at 50 cents.

Q. You have been sitting in the courtroom. That is the transaction to which Mr. Maffei testified the other day? A. I believe it is.

Q. Next?

A. June 3, Wulff Hansen & Company, 333 $\frac{1}{3}$ shares of common at 65 cents.

Q. That was June 1941, was it not?

A. June 1941.

Q. Next?

(Testimony of W. G. Evans.)

A. June 2, 1942, 300 shares of preferred at $2\frac{1}{2}$ per share. July 15, 1942, Hill Richards & Company, 100 shares at $3\frac{1}{2}$ per share. 1943, January 19, Elworthy & Company, 500 shares of preferred at \$5 a share.

Q. Next? A. That is all I have.

Q. That completes the list as far as you have any record of it? A. Yes.

Q. That is the entire list, as far as you know, of any purchases by Peter and Henri Bercut?

A. Yes.

Q. And did you have any record showing where purchases were made? A. Yes.

Q. So far as you know, there was no acquisition of any Merchants Ice & Cold Storage stock by the Bercuts prior to the first time you have mentioned there other than the one Mr. Bercut testified the other day that Mr. Scampini got for him from Vincent some years back; you have no record of that? A. No. [361]

Q. But aside from that, those are all the purchases that you know of? A. Yes.

Q. Now, at the time the negotiations for the purchase of the Pacific Empire Holdings were in progress, you were in touch with that matter for Mr. Bercut? A. Yes.

Q. He had you make an analysis of accounts and balance sheet of the Merchants Ice & Cold Storage Company? A. Yes.

Q. And any letter or letters he received from

(Testimony of W. G. Evans.)

Pacific Empire Holdings, from Mr. Arnold or otherwise, he turned over to you for custody at the time? A. Yes.

Q. There is in evidence here a contract dated January 8, 1941. You recall the original purchase contract of January 8, 1941, do you not, without stopping to refer to the exhibit? A. Yes.

Q. Now, sometime shortly thereafter did you receive other letters from Pacific Empire Holdings through Mr. Arnold with respect to this transaction and purporting to consummate it? A. Yes.

Q. Will you produce them, please. The fact of the matter is that the transaction was not completed on January 8, 1941, was it, Mr. Evans?

A. No.

The Court: We will take a short recess.

(After recess.)

Mr. Naus: During recess I have shown these to Mr. Scampini.

Q. This letter of January 14, 1941 you received in the ordinary course of business at that time, didn't you? A. Yes.

Q. That is Mr. Arnold's signature, is it?

A. I believe so.

Mr. Naus: I will offer this in evidence.

The Court: It may be admitted and marked.

(The letter was marked "Defendants' Exhibit I.")

(Testimony of W. G. Evans.)

DEFENDANTS' EXHIBIT I
PACIFIC EMPIRE HOLDINGS
Incorporated
26 O'Farrell Street
San Francisco

January 14, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, California

Dear Mr. Bercut:

In accordance with the terms and conditions of our sale to you of certain shares of stock of Merchants Ice and Cold Storage Company, as referred to and agreed upon in our letter of the 8th, we are herewith delivering to you this date stock certificates aggregating 66,595 shares, in accordance with the certificates described on the attached delivery ticket.

There is attached hereto copies of our letters addressed to California Baking Company and Wm. H. Roussell, referring to the delivery of 5,516 $\frac{2}{3}$ shares and 700 shares Preferred stock, respectively, of Merchants Ice and Cold Storage Company, upon final payment of amounts owing by this company.

We have yet to deliver to you, pursuant to the conditions of our agreement above referred to, the total of shares.

In addition to the stock delivered, there are 2,000 shares Common stock registered in the name of Con Shea, evidenced by certificates Nos. 110, 111,

(Testimony of W. G. Evans.)

for 1,000 shares each. These certificates have never been in our possession even though they are owned by the company. A "Stock Transfer" has been on the books of the company for many years, and evidence of your ownership has now been placed on the stock records.

Yours very truly,

L. R. ARNOLD

Executive Vice-President

LRA/lk

January 15, 1941

Mr. Louis Sutter, Vice-President
Anglo California National Bank
#1 Sansome Street
San Francisco, California

Dear Sir:

Please be referred to our note in favor of California Baking Company, with balance due of \$3,900.00, secured by the pledge of 5,516 $\frac{2}{3}$ shares Preferred stock of Merchants Ice and Cold Storage Company.

When the balance due is paid to California Baking Company you are authorized and directed to deliver the collateral hereinabove referred to, to Mr. Peter Bercut.

May we ask that you kindly acknowledge this authorization by advice to Mr. Bercut?

Yours very truly,

L. R. ARNOLD

Executive Vice-President

LRA/lk

(Testimony of W. G. Evans.)

January 15, 1941

Mr. Wm. Roussell
152 Clay Street
San Francisco, California

Dear Mr. Roussell:

Please be referred to our obligation to yourself, with balance due of \$5,100.00, secured by 700 shares Preferred stock of Merchants Ice and Cold Storage Company.

Upon final payment of the balance due, you are hereby authorized and directed to deliver the collateral as hereinabove mentioned, to Mr. Peter Bercut.

May we ask that you kindly acknowledge this authorization by advice to Mr. Bercut?

Yours very truly,

L. R. ARNOLD

Executive-Vice-President

LRA/lk

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. I. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Letter of January 31, 1941 from Arnold to Peter Bercut was marked [362] "Defendants' Exhibit J.")

(Testimony of W. G. Evans.)

DEFENDANTS' EXHIBIT J

PACIFIC EMPIRE HOLDINGS

Incorporated

26 O'Farrell Street

San Francisco

January 31, 1941

Mr. Peter Bercut

739 Market Street

San Francisco, California

Dear Mr. Bercut:

Confirming our conversations this date, there are certain shares of stock not yet delivered to you, to-wit:

# 17—150 shs.	M.I.C.S.—Preferred
#128— 25 “	“ —Common
#129— 25 “	“ — “
#139—241 “	“ — “
#141—100 “	“ — “
#146— 33 $\frac{1}{3}$	“ — “
#149—333 $\frac{1}{3}$	“ — “
#157—597 shs	“ — “
#162—120 “	“ — “

1,624 $\frac{2}{3}$ shs.

pursuant to our agreement of January 8, 1941.

Please know that we will immediately deliver this stock as soon as it is obtained from the present holder, if not additional stock will be purchased on the market, in order to make up any existing dif-

(Testimony of W. G. Evans.)

ference in the number of shares delivered to date, and those mentioned in the letter above referred to.

Yours very truly,

L. R. ARNOLD

Executive Vice-President

LRA/lk

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Deft's Ex. No. J. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Naus: Q. Referring to this letter which is dated January 31, 1941, Defendants' Exhibit J, did Pacific Empire Holdings ever subsequently deliver to you the shares they therein promised?

A. No.

Q. Now, have you at the request of Mr. Brownstone prepared a detailed summary or memorandum of all the certificates and shares of common and preferred stock received from Pacific Empire Holdings, and can you produce that and tell us the number of shares of common and the number of shares of preferred respectively that were to come to you in the deal, the number of shares you received, and the number of shares you are still short on the deal?

Mr. Naus: Would you like to look at the memorandum first, Mr. Scampini? (Handing paper to counsel.)

(Testimony of W. G. Evans.)

Q. Mr. Evans, so far as the custody of the records of this deal is concerned, you personally had complete charge of it, didn't you? A. Yes.

Q. What you have here is a summary prepared by you from the immediate records of the stock certificates of preferred and common shares received, and it is a true and complete summary, is it not? A. It is true and complete.

Q. Now, with respect to the common shares, what was the quantity of common shares that were to come to you on the deal?

A. 65,863 shares.

Q. How many did you actually receive?

A. 62,341.

Q. How many shares of common are you still short on the deal, never delivered to you?

A. 3,522.

Q. Now turning to the preferred, what was the quantity of preferred shares that were to come to you on the deal, to Mr. Bercut? [363]

A. 12,495 shares of the preferred.

Q. How many shares of preferred actually came to you? A. 12,186 $\frac{2}{3}$ shares.

Q. How many shares of preferred are you still—that is, Mr. Bercut—still short on the deal?

A. 308 $\frac{1}{3}$ shares.

Q. Now, in respect to the shares that were actually received did not one or the other of the Bercuts have to pay out some money over and above the \$35,000 in order to get the share certificates?

(Testimony of W. G. Evans.)

Q. You recognize this canceled check, do you, Mr. Evans? A. Yes.

Q. You know what it was given for, don't you?

A. I beg your pardon?

Q. Do you know what the check was given for?

A. The check was given to the Pacific Empire Holdings, Inc.

Q. For what purpose?

A. For the purpose of releasing 5,000 and some-odd shares of the preferred at the Anglo Bank.

Q. In other words, that was supposed to be part of the deal; they were held at the Anglo Bank and they would not let go of them until they were paid; is that correct? A. Yes.

Q. Did it take that amount of money to get the shares? A. That is right.

Q. And did that transaction occur as of the date of that check, in other words, the check is truly dated? A. Yes.

Mr. Naus: I offer the check in evidence.

The Court: It may be admitted and marked.

(The check was marked "Defendants' Exhibit K.")

(Testimony of W. G. Evans.)

DEFENDANTS' EXHIBIT K
FRENCH-AMERICAN BRANCH
BANK OF AMERICA
National Trust & Savings Association

No.....

San Francisco, Calif.

April 10, 1941

Pay to the Order of Pacific Empire Holdings
Inc. \$3950.00

Thirty-nine hundred fifty and 00/100 Dollars

HENRI BERCUT

(on reverse)

Pacific Empire Holdings Inc. A. A. Kern, Tres.
L. Keener, Asst. Secy, for Deposit.

California Pacific Service, Inc. A. A. Kern, Tres.

39 Paid through Clearing House or Pay to the or-
der of any Bank or Trust Co. Prior endorse-
ments guaranteed. Apr. 12 1941 Pacific National
Bank of San Francisco 11-39

[Endorsed]: Defts. Ex. No. K. Filed 5-6-43.
Walter B. Maling, Clerk. J. P. Welsh, Deputy
Clerk.

Mr. Naus: Q. What bank is that drawn on?
That is a Bank of America check with "French
American Branch" written above.

A. That is the French American Branch of the
Bank of America. [364]

(Testimony of W. G. Evans.)

Q. That money, as I understand it, was paid by Henri Bercut to Pacific Empire Holdings, who in turn turned it over to the bank and got the stock?

A. Yes.

Q. Did the Pacific Empire Holdings ever pay back to Henri Bercut that money? A. \$100.

Q. So that the Bercuts are still out \$3,850 over and above the \$35,000? A. Yes.

Q. I hand you Defendant's Exhibit C, the balance sheet of Merchants Ice & Cold Storage Company of December 31, 1940, Mr. Evans. Now, you have compared that balance sheet in detail with the account books of Merchants Ice & Cold Storage Company, have you not, studied it in detail, all the items on it? A. Yes.

Q. And where a total is shown under a heading, you have gone to the books and found out the individual items that that total breaks down into, haven't you? A. To a great extent, yes.

Q. Now, taking that balance sheet, you find a heading, "Accounts Receivable \$134,219.78." You find that, do you not? A. Yes.

Q. Did you or not find upon an examination of the details of that item whether a substantial amount of that appeared to be uncollectible and was written off? A. Yes.

Q. Will you identify the separate, individual items of this accounts receivable and name any account that was an uncollectible item and had been written off as loss.

(Testimony of W. G. Evans.)

A. Frostrcraft Corporation, \$11,056.44; W. A. Sherman account, \$9,595.15.

Q. Frostrcraft Corporation how much?

A. \$11,056.44.

Q. Was there Globe Brewing Company receivable in there? A. No.

Q. Was there any Pacific Empire Holdings receivable in there? A. \$35,949.29. [365]

Q. Is that Pacific Empire Holdings or Pacific Empire Corporation? A. I don't know.

Q. You don't recall at the moment?

A. No.

Q. It is one of the two? A. Yes.

Q. Was there a San Francisco Fruit Company item there? A. Yes.

Q. How much? A. \$1,617.26.

Q. As I understand it, then, these items that you have now stated by name of the debtor and amount were included in the accounts receivable of the Merchants Ice & Cold Storage Company as of December 31, 1940 and turned out to be worthless? A. That is right.

Q. Now, with respect to the accounts payable—you find under current liabilities a subheading of "Accounts Payable, \$30,462.24." Can you tell me, please, how much, if any, of that was an amount or overdue amount owing to the Pacific Gas & Electric Company at that time?

A. Yes, they owed Pacific Gas & Electric Company \$11,341.62.

(Testimony of W. G. Evans.)

Q. That was for what—power? A. Power.

Q. And that was an accumulation of about how many months, that power bill?

A. Four months.

Q. Did you find that there was any difficulty with the P. G. & E.? Did you find that the file contained any correspondence showing any threat from the P. G. & E.? A. No actual threat.

Q. Was there any threat of discontinuance of service that you know of?

A. Mr. Plagemann informed me there were.

Q. In that balance sheet of December 31, 1940, on the liabilities side, what did you find from an examination of the books with respect to the status of taxes, property taxes owing to the City and County of San Francisco? It shows here current [366] liabilities, taxes payable to City and County of San Francisco, \$25,000. A. \$25,704.73.

Q. Was there any of that delinquent that was not paid up to date?

A. The December installment had not been paid.

Q. How much does that amount to?

A. Somewhere in the neighborhood of \$11,000.

Q. Now, separate and apart from the liabilities shown on the balance sheet, did or did not the Bank of America make claim or was it making a claim somewhere toward the end of 1940 in connection with butter receipts? A. Yes.

Q. What amount were they claiming?

A. \$38,477.79.

(Testimony of W. G. Evans.)

Q. That is not included in the balance sheet, is it?
A. No.

Q. Now, after Mr. Bercut took over the management was or was not a settlement finally made with the Bank of America after an investigation and discovery that they were holding receipts that had no butter behind them?
A. Yes.

Q. Under Mr. Bercut's management how much was actually paid to the Bank of America to settle that butter claim?
A. \$22,000.

Q. Now, state whether or not a man by the name of Sozzo was making a claim against the Merchants Ice & Cold Storage Company, a claim not recorded as a liability on the balance sheet?
A. Yes.

Q. What is the amount of that claim?

A. \$43,000 in principal amount and \$10,000 in interest, attorney's fees.

Mr. Naus: I will lead on that.

Q. The Merchants Ice & Cold Storage Company filed in the State Court, and there is still pending in the State Court, a suit to foreclose the mortgage against the Globe Brewing Company and in connection with that claim that I mentioned Sozzo put in [367] a cross-complaint seeking \$42,000 damages against the Merchants Ice & Cold Storage Company and others, and that is still pending and at issue and undecided in the State Court.

Mr. Scampini: Correct.

Mr. Naus: Q. Whether there is anything due or not is undetermined, but that \$42,000 claim is

(Testimony of W. G. Evans.)

still pending in court and not included in the balance sheet; isn't that correct? A. Yes.

Q. Now, Mr. Evans, would you tell me, please, from your examination of the Merchants Ice & Cold Storage Company records that came into your possession what was the last year before the year 1941 in which the Merchants Ice & Cold Storage Company operated at a profit? A. The year 1930.

Q. And in every year subsequent to 1930 and prior to 1941 it operated at a loss, didn't it?

A. Yes.

Q. And the books disclose what was the aggregate amount of annual losses of the Merchants Ice & Cold Storage Company operations from and including the year 1931 to and including the year 1940? A. What is the aggregate?

Q. From and including 1931 and including 1940.

A. \$543,501.25.

Q. Now, you have given us the aggregate. Will you give us the amount for each year beginning with year 1931 as the first year, and ending with the year 1940?

A. 1931, \$47,517.09; in the year 1932, \$146,600.46; in the year 1933, \$90,413.95; in the year 1934, \$36,791.86; in the year 1935, \$38,575.89; in the year 1936, \$75,114.59; in the year 1937, \$8,424.03; in the year 1938, \$128,285.18; in the year 1939, \$17,762.76; in the year 1940, \$54,014.44.

Q. The amount you have given year to year is the loss for each [368] of those years, is that correct? A. Yes.

(Testimony of W. G. Evans.)

Q. Now, Mr. Evans, when did the turnover of Merchants Ice & Cold Storage Company actually take place?

A. You mean when the money passed?

Q. Well, no, when the shares were delivered and you were actually put in possession. When was Mr. Bercut actually put in possession?

A. February 1, 1941.

Q. Now, when you took possession you found practically no cash on hand; isn't that the fact?

A. Yes.

Q. Can you tell offhand about how much?

A. Around \$2,000.

Q. Around \$2,000? A. Yes.

Q. Now, at the time you took possession what did you find were the immediate needs and requirements of Merchants Ice & Cold Storage Company for a period of approximately a year from the time of taking possession? Will you give the items like interest and taxes?

A. We were faced with the outlay of cash for the interest on April 1, 1942.

Q. That was due under the bond issue?

A. Under the bond issue.

Q. Semiannual interest?

A. Yes, \$21,433.75. Taxes April 20, 1941——

Q. Taxes that had to be paid on April 19, 1941?

A. \$25,704.75. Interest October 1, 1941, \$21,-433.75. Taxes December, 1941, installment, estimating no interest, \$25,704.75. Interest April 1,

(Testimony of W. G. Evans.)

1942, \$21,433.75. Retirement of the bonds, April 1, 1942, \$40,000. Insurance expiring 1941 approximately \$5,000 premium. A total of \$162,710.71.

Q. So that for the period of the next thirteen or fourteen months immediately after taking possession it was necessary for the Bercuts to see to the provision of cash in the amount of \$163,000 over and above the ordinary business operating [369] expenses; that is correct, is it not? A. Yes.

Q. And did the Bercuts or not provide that cash, and were those paid?

A. We were short at the time of the retiring of the bonds in the sum of \$18,000.

Q. Did or did not the Bercuts from their personal funds send money to the Merchants Ice & Cold Storage Company to meet those obligations such as you have described as they fell due and as money was needed to do it? A. Yes.

Q. Now, as manager of that plant beginning February 1, 1941, I assume that you went through and examined the plant, the physical condition?

A. Yes.

Q. Would you describe to his Honor in a general way but sufficiently fully to intelligently give him a description of the physical condition of the plant at the time it was turned over to the Bercuts?

A. Well, starting with the roof, the roof of the buildings was in very poor shape, and during the year 1941 we did not have the money to do much repairing to them at all. In 1942 we spent large sums repairing the roof.

(Testimony of W. G. Evans.)

Q. "Large sums" is more or less meaningless. Will you itemize it?

A. Approximately \$6,000 to \$10,000. When the roof leaks in a cold storage house like that the water comes down into the insulation between the walls and ruins the insulation; and the coils, pipes in the refrigerator room are very old, pitted, and many leaks in them. We had to spend large sums and are still spending them to fix the insulation and the coils. And in the walls of the building you can see breaks, and the mortar between the bricks has disintegrated. The floors due to leaks from the coils are very bad, and we are continually looking after the floors, after the roof and [370] the coils and the equipment. The Globe Brewing Building, what used to be the Globe Brewing Building, we fixed over; we gunnited it. That was affected by termites. We had to spend, to make that building satisfactory, in the neighborhood of \$30,000.

Q. What would you say would be the approximate aggregate of money that had been spent since the Bercut management took hold in 1941 in an endeavor to repair and renew the physical plant, the buildings, equipment and so on?

A. I think probably \$100,000 already.

Q. You have spent already \$100,000?

A. Yes.

Q. Have you work in progress right now?

A. Right now we are committed to probably \$200,000 or \$250,000 more.

(Testimony of W. G. Evans.)

Q. In other words, you have spent about \$100,000 to put the plant in shape and you are committed by contract to put \$200,000 in addition to that in to put the plant in shape?

A. It will take another \$250,000 before we get it in anything like the shape that the Bercuts like to have in operating plants.

Q. You have already spent roughly \$100,000 for repairs of the plant since the Bercuts took it over, and in addition to spending \$100,000, you are actually presently committed to about \$200,000 more?

A. Well, maybe \$150,000 more.

Q. Then over and above those two items, as part of the further program, as time goes on, you believe it will take at least a quarter of a million to put the plant in proper shape? A. Yes.

Q. Will you tell me the total gross sales or revenue of Merchants Ice & Cold Storage year by year for the last five or six years, for the years you have got together for me, giving it by year, and the amount of gross sales of storage space and gross revenue?

A. The total revenue for the year 1937 [371] was \$436,097.78.

Q. That is what you received from customers in payment of all operations?

A. That is our gross sales from all sources.

Q. From the gross operations. Go ahead with the next year. A. 1938, \$354,688.

Q. Next? A. 1939, \$386,404.86.

(Testimony of W. G. Evans.)

Q. Next?

A. 1940, \$371,350.85. 1941, \$453,599.26. 1942, \$845,647.57.

Q. Now, as a matter of fact, the year of 1942 ended up with good operating results, largely, did it not, through the practically doubling of the gross business? A. Yes.

Q. Now, in jumping up the gross business done by that company for the year 1942 to something over \$800,000 a year, did or did not Mr. Peter Bercut go out into the trade and bring in new business? A. Yes, he did.

Q. Now will you indicate to his Honor by names of customers the six or eight largest new customers he brought in, and with respect to each one about the annual amount of business that he brought in.

A. I will take the large figures first. Swift & Company did business with us in 1940 of \$21,428.89.

Q. You mean that is an increase in business?

A. No, that was the revenue from Swift & Company in the year 1940.

Q. Go ahead.

A. In 1941 it was \$40,654.09; in 1942 it was \$23,-644.81. Armour & Company in the year 1940, we had a gross revenue from them of \$1,482.09; in 1941 we had \$5,134.96; in 1942 we had \$9,757.16. Cudahy Packing Company, we had no business with them in 1940, and business from Cudahy in 1941 and 1942 amounted to \$16,652.89. Wilson & Company, another meat packer, never did any business with the

(Testimony of W. G. Evans.)

Merchants Ice & Cold Storage Company until the Bercuts came there, and the [372] business of Wilson & Company during the two years was \$2,316.75. Swanson & Company, meat packers, \$37,376.72.

Q. That is new business?

A. That is new business. And there is a small amount of \$24.72. There was an increase in business from Swift and Armour and new accounts with the other large packers amounting to \$135,570.12.

Q. Gross business?

A. Gross business. The following never did business with the Merchants Ice & Cold Storage Company until Peter Bercut solicited them: Bercut-Richards Packing Company, \$3,353.79; Sutter Packing Company, \$314.48; F. E. Booth Company, \$14,941.85; Oakland Canning Company, \$1,605.81; Pratt-Low Company, \$174.63; Heinz & Company, \$2,409.25; Hunt Bros. Packing Company, \$1,454.59; Sweitzer & Company, \$1,217.52. None of these had done any business during 1940—maybe sooner than that, but during 1941 and 1942 there was an increase in business from them of \$25,550.72.

Q. Have you stated the main new customers now or not?

A. That is the main contracts with meat packers and with the canneries. There were other new accounts that have taken place since.

Q. Mr. Evans, I forgot to ask you when you came to court whether you could break the balance sheet down in buildings, machinery and equipment,

(Testimony of W. G. Evans.)

into the three separate items included under that.
Can you do that?

A. I think I have a breakdown.

Q. You remember the balance sheet started out with an item of something above \$2,000,000 before depreciation, and then after giving effect to depreciation of two years it has come down to something like \$1,000,000; but I would like to find out how that \$2,000,000 was broken into separate items of buildings, machinery and equipment.

A. The way it is [373] broken down on the books on the plant account of 1940, the buildings were carried at \$1,409,426.95.

Q. That is the buildings before depreciation?

A. That is shown on the books.

Q. Next?

A. Machinery and equipment \$858,505.30.

Mr. Naus: You may cross-examine.

Cross Examination

Mr. Scampini: Q. Mr. Evans, let us take the actual items first. You say that is the value at which the buildings were carried in 1940? A. Yes.

Q. What is the aggregate amount of the buildings and machinery? A. \$2,284,365.54.

Q. Upon what basis or what formula were those buildings and improvements and machinery carried? How was the figure arrived at?

A. I understand they were originally set up on the 1927 appraisal.

(Testimony of W. G. Evans.)

Q. All right. I will show you here a summary of the American Appraisal Company. If I understand your testimony correctly, you stated you are a certified public accountant by profession?

A. No, not certified.

Q. Are you an accountant? A. Yes.

Q. A bookkeeper?

A. Yes, I am a bookkeeper.

Q. Have you examined the American Appraisal Company's appraisal of this property?

A. No.

Q. So you would not care to testify with respect to the exhibit that I am now showing you, which is Plaintiff's Exhibit 30? A. No.

Q. You don't know whether these buildings, improvements and equipment were appraised by the American Appraisal Company in 1927 on two bases, that is, cost of reproduction and the [374] sound value basis?

A. I have glanced it over, but I don't know much about it.

Q. Now, as against that aggregate figure are you in a position to state whether or not that is the reasonable value of buildings and improvements, machinery and equipment, the figure you just testified to? A. No.

Q. You would not yourself know, would you?

A. No.

Q. Do you know how much depreciation has been taken or set up? A. \$1,336,625.18.

(Testimony of W. G. Evans.)

Q. What is the net carried value of the buildings, machinery and equipment as of 1940?

A. \$947,743.36.

Q. Now, you testified concerning ten years when the company's loss fluctuated anywhere from \$8,000 for a year to one year as high as \$100,000 and some-odd, and beginning with 1930 and ending with 1940, a ten-year period, if I follow your testimony, it was to the effect that approximately \$540,000 was the aggregate loss; is that correct?

A. That is what I got from the statement.

Q. Now, do you know whether or not between 1930 and 1940 new capital was put into this company?

A. Not as far as I know.

Q. Will you please state how much the company had outstanding on its bond issue on January 1, 1930?

A. 1930?

Q. Yes. A. I would not know.

Q. Do you know how much it had outstanding on January 1, 1941?

A. Yes, I think it was \$659,500, was it not?

Q. And do you know that between January 1, 1930 and December 31, 1936 more than \$250,000 in bonds were retired in this company?

A. No. I did not pay any attention to 1936.

Q. As a matter of fact, whatever was retired from this bond issue—and of course your books will disclose it—I think [375] was \$250,000, if I correctly remember the figure—that was paid out of the operations of this company, wasn't it?

(Testimony of W. G. Evans.)

A. I would not know.

Q. No new capital was put in?

A. Well, there might have been some borrowing; I couldn't say.

Q. Do you know what the current liabilities or total liabilities of the company as of January 1, 1930?

A. No, I don't know anything about that far back.

Q. You don't know whether after incurring a loss, as you say, of \$500,000 and some-odd the liabilities of the company were less or more at the end of this ten-year period? A. No.

Q. When you say that this company suffered a loss of \$540,000 for the ten-year period, of course you mean after having taken in excess of \$700,000 of depreciation during this ten-year period, don't you? Depreciation in this case is the equivalent of cash, is it not? A. Not necessarily.

Q. You have buildings and improvements that you depreciate during the year, say, at the average sum of \$75,000, and from an accounting point of view you are supposed to have \$75,000 that you have taken by way of depreciation, aren't you?

The Court: I think the record already discloses that.

Mr. Scampini: Q. And if you take the amount of net loss which you have testified to from the aggregate amount of depreciation, is it a fair statement to say or to make that there was practically

(Testimony of W. G. Evans.)

\$200,000-odd more in depreciation taken in this ten-year period than the loss that was actually incurred after depreciation?

Mr. Naus: That is argumentative.

Mr. Scampini: Q. You said that there was charged off \$11,000 on the Frostrcraft Corporation.

A. Yes. [376]

Q. Do you know anything about the transaction whereby 500 shares of stock were purchased in Frostrcraft by Peter and Henri Bercut?

A. Yes.

Q. Will you tell us all those facts?

A. The Allied Products Company owed Merchants on storage.

Q. How much?

A. \$5,000. They would not pay, apparently, and they had some difficulty about their stock, and Peter Bercut gave Allied a check for \$5,000 in payment for the stock, and Allied in return paid their bill to Merchants in the sum of \$5,000.

Q. In effect Mr. Peter Bercut's object was to have 500 shares of stock in the Frostrcraft Corporation?

A. Yes.

Q. You mean to say that you charged that off accounts receivable as uncollectible?

A. Yes.

Q. Why did you charge it off as uncollectible?

A. Because they could not collect.

Q. You mean because the company was insolvent?

A. Well, you couldn't collect it.

Q. When did you charge it off? After the stock was delivered to Peter Bercut or before?

(Testimony of W. G. Evans.)

A. Before, at the end of 1941.

Q. When did Peter Bercut acquire the stock

A. In 1942.

Q. By that time the Frosteraft Corporation had improved its position?

A. In 1942 the Frosteraft condition was they were able to pay their current bills. They have not paid anything on the old indebtedness.

Q. Will you please give us the acquisitions made by Peter Bercut of bonds of the Merchants Ice & Cold Storage Company just as you have given us the acquisition of common and preferred stock? Have you that? A. No.

Q. Will you do that and have it here in the morning? [377] A. I will try.

Q. When did Mr. Bercut start to acquire stock in the Merchants Ice & Cold Storage Company and actually accumulate it?

A. I think the first he got was the 2,000 shares.

Q. I mean, when did he actually start picking it up in the market, in 1938 or 1939, if I remember your testimony?

A. He bought some from DeVoto in January 1940.

Mr. Naus: The earliest date he testified to was in January 1940.

The Court: He has a memorandum on it.

The Witness: Do you want it?

Mr. Scampini: Q. No, your best recollection. How did he acquire this stock; how did he begin to acquire it? What would he do?

(Testimony of W. G. Evans.)

A. Why, pay cash for it.

Q. Would he put bids in on the market?

A. No.

Q. How did he happen to get it?

A. Some of the brokers called him up and said, "I have some Merchants Ice & Cold Storage," and they wanted so much for it.

The Court: His testimony was they called him up and solicited.

The Witness: Yes, they solicited him.

Mr. Scampini: Q. It is true, is it not, that there were only two places where Merchants stock could be disposed of, with Peter Bercut and Henri Bercut?

A. I would not know.

The Court: How do you mean?

Mr. Scampini: I mean, if anyone wanted to dispose of stock in the Merchants Ice & Cold Storage Company, there were only two points of interest, Peter Bercut and Pacific Empire Holdings.

The Court: One of the witnesses said that these brokers [378] can make a market.

Mr. Scampini: It may be, your Honor, but they make their own market without relation to——

The Court: Nevertheless it is due to action by themselves.

Mr. Scampini: Q. You say that when Peter Bercut went into business there in 1941 you had to find means of raising some \$100,000 to meet obligations for 1941?

A. \$161,000.

Q. The company met its obligations, did it not?

(Testimony of W. G. Evans.)

A. No, I stated on retiring the bonds they borrowed money from him personally.

Q. Is that the only time they had to borrow money from Peter Bercut? A. I believe so.

Q. How much did they borrow?

A. \$18,000.

Q. Would that be in 1942? A. Yes.

Q. Not in 1941? A. Not 1941.

Q. But the company paid off its own obligations from its operations, did it not? A. Yes.

Q. Has Mr. Peter Bercut been paid off all the obligations for the company that he loaned?

A. Yes.

Q. For how long a period of time did he loan the company this \$18,000?

A. I think it was two or three months.

Q. Did he take a note for the indebtedness?

A. I believe he did.

Q. Did he charge interest for the advancement?

A. Yes.

Q. What rate? A. Four per cent.

Q. Now, during 1941 you say that the company found it necessary to spend a large sum of money?

A. In 1941?

Q. In 1942, for repairs and rehabilitation.

A. Yes.

Q. Have you any idea of the aggregate amount that it expended during 1942 for repairs and rehabilitation?

A. I mentioned [379] the sum of \$100,000.

(Testimony of W. G. Evans.)

Q. That was paid out of the operations of the company, was it not? A. Yes.

Q. Out of its own earnings, is that right?

A. That is right.

Q. Now, as a matter of fact, you found it also necessary to expand your facilities to accommodate the increasing volume of business, didn't you?

A. Not yet.

Q. But some of the rehabilitation was for the purpose of accommodating the increased requirements of the business, wasn't it?

A. I don't think so.

The Court: Q. What about that Globe building?

A. That was an old building.

Mr. Scampini: Q. In connection with the new business, I notice that you mentioned as one of the new customers the Bercut-Richards Packing Company. A. That is right.

Q. That is Mr. Bercut's own company, is it not?

A. That is a corporation in Sacramento.

Q. He had that long before he ever acquired this block of stock? A. Yes.

Q. He was director of the Merchants Ice & Cold Storage Company for a couple of years before he acquired this stock, wasn't he?

A. I think he was.

Q. There was no reason in the world why the business of the Bercut-Richards Packing Company could not have been acquired by the Merchants Ice

(Testimony of W. G. Evans.)

& Cold Storage Company prior to his acquisition of this block of stock, was there?

A. It is quite a distance to come down, inconvenient.

Q. Before Mr. Bercut acquired this block of stock they did not do it because it was inconvenient, but when Mr. Bercut acquired the controlling interest in Merchants Ice & Cold Storage Company [380] they overlooked the inconvenience end of it?

A. They wanted to help Merchants out.

Q. All of the obligations of Merchants Ice & Cold Storage Company which had to be met in the year 1941, bearing in mind Mr. Bercut took over the management February 1, 1941, were all met on the due date, weren't they?

A. Not all of them, no.

Q. But you had no difficulty in arranging with your creditors to defer some of them until you could probably meet them?

A. On Peter Bercut's guarantee.

Q. What did he guarantee besides the bank account?

A. Well, for a while there I made personal statements for him and his brother to try to boost their trade and their confidence in him personally.

Q. You say you made personal statements. Is that the extent of the guarantee?

A. To show that there was something back of the house.

Q. They did some \$370,000 of business in 1940?

(Testimony of W. G. Evans.)

A. Yes. When Peter Bercut first came in, everybody was afraid to put their merchandise in there.

Q. They did how much business in 1941— \$470,000? A. Yes.

Q. It increased approximately \$100,000 over 1940, is that right?

A. Yes. They were waiting to find if Mr. Bercut was going to put anything in there.

Q. Did Mr. Bercut put anything in there?

A. He guaranteed everything behind it.

Q. What did he guarantee besides the bank account? A. Isn't that enough?

The Court: Q. What amount was that?

A. Around \$100,000.

Mr. Scampini: Q. That was over at the Pacific National Bank? A. Yes. [381]

Q. What else did he guarantee?

A. He gave his own personal statement, saying he would be personally responsible for the merchandise in the Merchants Ice & Cold Storage Company.

Q. Did he sign any guarantee?

A. I don't know about signing, but he gave his personal assurance.

Q. He just gave his personal assurance?

A. When he said, "The Merchants will be all right," there were men up there every week checking things; they were afraid that they would not be.

Mr. Scampini: Might I ask the indulgence of the Court to permit Mr. Hubner to ask a few questions on cross-examination?

(Testimony of W. G. Evans.)

The Court: Certainly.

Mr. Hubner: Q. Mr. Evans, you were in court when Mr. Bercut testified the other day?

A. I have been here most of the time.

Q. You heard his testimony, you heard the testimony of him entirely?

A. I believe I heard most of it.

Q. Did you hear testimony that he gave that the statements that were furnished him by Mr. Arnold concerning the Merchants Ice & Cold Storage Company were given by him to you for examination?

A. Yes.

Q. I believe his description was they were phony; I believe that was the word he used.

A. I probably made that statement because I was trying to get him out of it all the time.

Q. You advised him these statements were incorrect and they were made to conceal information rather than accurate?

A. I took a glance at the accounts receivable and the liabilities and I said to keep out of this thing.

Q. Mr. Bercut made the statement that you said that they were phony. Did you hear him say that?

A. He might have used that word "phony," but by "phony" I mean shaky. [382]

Q. You are general manager down there, aren't you?

A. Yes.

Q. The statements covering the years 1941 and 1942, were they prepared under your supervision?

A. Yes.

(Testimony of W. G. Evans.)

Q. And how are those statements? Are they true and correct statements of the condition of the company?

A. Well, they are a continuation of what we started with.

Q. In other words, these statements do not correctly represent the facts?

A. That I don't know. I carried the same assets right along just as was done before, as far as value is concerned.

Q. You are talking about the value of the physical assets? A. Yes.

Q. How about the other assets on the balance sheet? A. What do you refer to now?

Q. I am referring to the accounts receivable.

A. The accounts receivable are good now compared to what they were before; that is, as good as they could be.

Q. Now, as a matter of fact, you never made any addition to the reserve for the bad debts for the last two or three years, did you? A. No.

Q. Not at all? A. No.

Q. The reason you have not made any addition to the reserve for bad debts is the reserve was considered more than adequate to cover the bad accounts? A. Yes, we think so now.

Q. You say you think so now. You have made no change in it?

A. No, we have not changed it. We carry things just the same. When you have claims for something

(Testimony of W. G. Evans.)

like that, your accounts receivable are gone out of the window if your trade is bad.

Q. How about your other assets down there, the assets shown in the balance sheet? Take a look at it if you would like to. A. 1942? [383]

Q. Yes, 1942.

The Court: Direct his attention to whatever you have in mind.

Mr. Hubner: Q. Now take the current assets on the balance sheet. Are those all true and correct?

A. Yes.

Q. The next classification is investment?

A. Yes.

Q. You verified the existence of those accounts. They are carried at a fair value?

A. That I do not know. They are carried as they were before, land and property and everything else.

Q. So the statement that you are using in fact is, in your opinion, correct only if the preceding statements are correct as rendered by the Empire Holdings Company?

A. No, by that I mean there is no change in the asset value. You can't make any change without correcting it.

Q. You have written off all of the things you considered worthless, haven't you? A. Yes.

Q. And in 1941 you charged off how much for bad debts? Will you look at the statement?

A. Do you want a list of the bad accounts charged off in 1942?

(Testimony of W. G. Evans.)

Q. In 1941. Will you take a look at that?

A. I can give it to you from the income tax statement.

Q. You made a charge there on operating expenses in 1941 of \$21,000 for uncollectible bills, didn't you? A. Yes.

Q. You also made a charge down there for uncollectible notes of \$13,000? A. That is right.

Q. Did those represent Pacific Empire Holdings notes? A. No, I gave you that.

The Court: I assume you have gone into the books fully for all purposes. In fact, I think we have spent entirely too much time on this. If there is any particular item you have in mind, [384] you might question him.

Mr. Hubner: Just one more question.

Q. What was the total adjustment that you wrote off during the years 1941 and 1942 to cover all these worthless assets on the balance sheet?

A. I think the income tax return will show that.

The Court: I think we have a record of it, if there is any question about it. We will take an adjournment now until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Friday, May 7, 1943, at 10:00 a.m.) [385]

Friday, May 7, 1943—10:00 A. M.

Mr. Naus: Have you finished with Mr. Evans?

Mr. Scampini: Yes.

Mr. Naus: You asked him about the bonds.

Mr. Scampini: We waive it.

WEBB RICHARDS,

called for defendants; sworn.

Direct Examination

Mr. Brownstone: Q. Mr. Richards, what is your present address?

A. 1943 Rosecrest Drive, Oakland.

Q. What business are you engaged in?

A. Dehydrating vegetables.

Q. On or about August 20, 1942, you were a director in Pacific Empire Holdings, Inc., were you not? To refresh your recollection, that is the day of the meeting held in Mr. Scampini's office of the directors of that corporation. A. 1942?

Q. Yes. A. Yes.

Q. And ever since that time you have been and now are a director of that corporation?

A. Yes. The corporation has been in receivership.

Q. But you have never resigned as a director?

A. No.

Q. So that you are now a director of that corporation? A. Yes.

Q. Your first connection with Pacific Empire Holdings occurred in connection with what transaction?

(Testimony of Webb Richards.)

A. Well, my first connection was many years back. I could not mention just the date, where I was requested by Mr. Arnold to assist him in refunding some of the bond issues of the Merchants Ice & Cold Storage Company.

Q. To refresh your recollection, that was in the year 1936 or [388] 1937, was it not?

A. Approximately.

Q. At that time you were associated with the investment firm of Stephenson Leydecker?

A. That is right.

Q. Your firm, mainly through your efforts, was instrumental in securing an extension of the bond indenture of the Merchants Ice & Cold Storage Company in 1937; that is correct, is it not?

A. That is correct.

Q. At that time the firm of C. H. Rollins had threatened to foreclose the bonds and Stephenson Leydecker gained the consent of sufficient bondholders to put through the reorganization plan?

A. That is not quite correct.

Q. What is correct?

A. There was a man—I can't remember his name—who at that time was trust officer of the Crocker Bank, who is now residing in San Quentin, I believe. There were certain technical violations there, and there was some trouble came up, and so we started to solicit the bondholders for consent to reorganization, and then some of the other houses—C. H. Rollins, who had been the origi-

(Testimony of Webb Richards.)

nal underwriters, stepped into the picture and wanted to carry the thing through, and we made an arrangement with them for the reorganization and we instituted it.

Q. Subsequent to that date, as the minute book of the Pacific Empire Holdings shows, on or about February 15, 1938, you were elected a director of the holding company? A. Yes.

Q. And subsequent to that time you attended an occasional meeting approximately once a year of the stockholders of that corporation?

A. That is correct.

Q. Now, where was your office subsequent to February 15, 1938?

A. Well, that is a difficult question to answer for the reason that I had been engaged in reorganization work of several [389] companies and I maintained an office from 1938, I was doing work for the Pacific Empire, and I believe had started on the Frostrcraft Corporation, and also was doing some work for the truck line and had offices at 242 Second Street. [390]

Q. In connection with the reorganization of the truck line, that reorganization was completed?

A. That was completed.

Q. On or about November, 1940, is it or is it not a fact that you at least occupied a portion of your time at the office of the Pacific Empire Holdings? A. That is correct.

(Testimony of Webb Richards.)

Q. Is it or is it not a fact that on or about November, 1940, Mr. Arnold requested you to interest any person whom you could interest in the purchase of the stock of Merchants Ice & Cold Storage Company then owned by Pacific Empire Holdings?

A. Mr. Arnold and I discussed for some time, the date would come within the time you mentioned various methods of trying to relieve both the holding company and Merchants Ice & Cold Storage Company of their difficulties, and I made several efforts to get the company financed along various lines, I approached investment houses and also certain parties, too.

Q. Did you approach the firm of Stephenson Leydecker in Oakland? A. Yes, naturally.

Q. Did you speak to R. D. Gross of the R. D. Gross Company here? A. I did.

Q. And your net result of all your attempts was you were unsuccessful in interesting them in the purchase or refinancing of the Merchants Ice & Cold Storage Company? A. That is correct.

Q. You knew that on or about this time Mr. Arnold was also negotiating with Mr. Bercut for the sale or refinancing of this Merchants Ice & Cold Storage Company shares of stock?

A. That is right.

Q. Now, Mr. Richards, can you estimate for us the period of time toward the end of the year 1940 during which you were endeavoring to interest other

(Testimony of Webb Richards.)

persons or firms in this block of Merchants Ice & Cold Storage Company stock?

A. That is right.

A. Let me make my position [391] clear, as far back as the time we were successful in extending these bonds, we were trying to get the company on a financial basis, and the market was so weak that in normal procedure we could see it would be almost impossible, and whenever any of us thought of an idea we would try to work on it; I cannot remember any specific time like say November, 1940. I know that during that period we were attempting to cure their financial trouble.

Q. During the period of negotiations with Mr. Bercut, you, yourself, were endeavoring to interest other persons in the purchase of this stock?

A. That is right.

Mr. Brownstone: That is all.

Cross Examination

Mr. Scampini: Q. Mr. Richards, you were one of the directors who joined in the minutes of August 20, 1940, consenting to the appointment of a receiver—1942, I mean—for the purpose of bringing this proceeding against the Bercuts to set aside this transaction, weren't you?

A. That is right.

Q. And there was a consent to the appointment of a receiver to attack this transaction?

(Testimony of Webb Richards.)

A. Mr. Arnold and I had discussed this matter. I at that time was of the opinion that the prospects of the company would be different from his, but he somehow agreed with me and thought perhaps the receivership would help us out, so I consented to it.

Q. Mr. Richards, Mr. Arnold had asked you to see if you could interest someone in taking over this block of stock owned by the Pacific Empire Holdings in Merchants Ice & Cold Storage Company?

A. To do what?

Q. To take over the block of stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings. Let me see if I [392] make myself clear. I will withdraw the question.

A. If I understand you, no.

Q. What did he say to you on or about October or November of 1940 with respect to your attempting to find someone to buy this block of stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings?

A. Well, the thing that I was working on was not the selling of that block of stock as much as to finance both the Merchants Ice & Cold Storage Company and the holding company, to work out a procedure that would keep them solvent.

Q. Did Mr. Arnold ever ask you to look for someone who would buy the entire block of stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings, Inc.?

(Testimony of Webb Richards.)

A. No, I do not think he did. At least, I never attempted to.

Q. Did you ever try to interest anyone to buy these 75,000 shares of Merchants Ice & Cold Storage Company stock consisting of 65,000 shares of common and over 12,000 shares of preferred owned by Pacific Empire Holdings, Inc.?

A. The exact number of shares I could not say, but the plan I was working on was one of refinancing the company and not to sell it outright.

Q. When did you first find out that Mr. Arnold had sold the entire block of stock for \$35,000 to Peter Bercut?

A. I believe the first time I really knew the complete details of that was at the time you discussed with me the advisability of the receiver at the meeting you spoke of.

Mr. Scampini: No further questions.

Redirect Examination

Mr. Brownstone: Q. Mr. Richards, you knew that Mr. Arnold had consummated some type of deal with Mr. Bercut in February of 1941, didn't you?

A. Whenever that was accomplished I knew it.
[393]

Q. You knew that Mr. Bercut had acquired an interest in Merchants Ice & Cold Storage Company in February of 1941? A. Yes.

Q. As a matter of fact, there were articles in the newspapers about it at that time, weren't there?

(Testimony of Webb Richards.)

A. I don't know about that, but I knew about it.

Q. It was a matter of public and general knowledge, was it not, in San Francisco?

A. I think so. I know Mr. Arnold and Mr. Bercut went down to see me at the time.

Q. So that you knew that the stock had been acquired?

A. I knew that he had acquired it at that time.

Q. Did you know, on or about August 20, 1942, at the time of this meeting at Mr. Scampini's office that prior to the date of that meeting Mr. Scampini had written a letter to Mr. Culbertson, in Delaware, containing the following statement: "The present management is not in a position, practically speaking, to rescind the transaction entered into with Peter Bercut, for the reason that the present management was a party to the transaction. Neither is the corporation in a position to attack the transaction, in a practical sense, for the reason that Merchants Ice & Cold Storage Company claims it has coming approximately \$25,000 from the holding company, and since Peter Bercut now owns the Merchants Ice & Cold Storage Company and runs it, if the corporation were to attempt to rescind the transaction whereby Peter Bercut acquired the said controlling interest, he would, logically enough, direct and see to it that Merchants Ice & Cold Storage Company file an attachment and execution on the claim and thus vitiate the proceeding." And made the further statement: "Any receiver of this

(Testimony of Webb Richards.)

corporation so appointed should be what we lawyers understand as a 'friendly receiver.' I am a creditor of the corporation to the extent of having an [394] unpaid balance due on a note equaling \$500. I also own 3263 shares of the stock of this corporation which years ago cost me considerable money and today is worthless. I suggest the following procedure. I will assign the promissory note to your secretary, Rebecca Tanzer, and transfer the stock to some other person designated by you. Let these two persons, one as a creditor and the other as a stockholder, file a complaint alleging insolvency or imminent threat of insolvency and inability to meet the debts as they mature; alleging further that the corporation can be made solvent by the preservation and conservation of its assets and the prosecution of the claims which it has against persons like Peter Bercut and others." And further stating: "Upon the appointment of such a receiver the first thing to do would be to rescind the transaction whereby Peter Bercut acquired the controlling interest of Merchants Ice & Cold Storage Company. I am sure that this case would be settled very quickly. Any kind of reasonable settlement should enable the corporation to pay off all of its claims, pay a good fee to the receiver and its attorneys, etc., etc., and probably leave something available for the stockholders." Did you know that on or about August 2, 1942, Mr. Scampini had written such a letter to Mr. Culbertson?

A. No.

(Testimony of Webb Richards.)

Q. Did you have any idea that the receivership proceedings had not been initiated in Delaware?

A. No.

Q. Was any such statement made at the meeting of the directors held on August 20, 1942?

A. Not to my knowledge. You understand I was not at that meeting; the minutes were presented to me afterward and I read them and I assented to them.

Q. You did not attend the meeting of the board?

A. I could not, I was out of town. [395]

Q. But you signed the minutes? A. Yes.

Q. Then the minutes of the meeting of August 20, 1942, as contained in Volume V of the minutes of the Pacific Empire Holdings, Inc., Plaintiff's Exhibit No. 6, which states there were present the following members: A. A. Heer, L. R. Arnold, M. T. Ryerson, Webb Richards and M. Maffei, are not correct when they state you were present at the meeting?

A. This is the meeting where the receivership was agreed to. I signed these minutes.

Q. But you were not at the meeting?

A. I could not attend the meeting.

Mr. Brownstone: That is all.

Recross Examination

Mr. Scampini: Q. Mr. Richards, let us take up Mr. Scampini's letter to Mr. Culbertson that was read to you and let us see if any statements are

(Testimony of Webb Richards.)

true or false. Was the Pacific Empire Holdings Company on or about August 20, or August 2, 1942, in your opinion, insolvent? A. Yes. -

Q. Is it not true that Mr. Arnold and Mr. Maffei had told you of a claim being pressed against the company in Wilmington by a group of stockholders?

A. Yes. .

Q. Isn't it true that Mr. Maffei and Mr. Arnold told you that they were consulting with Mr. Scampini to see what could be done about it?

A. I believe they did.

Q. Isn't it true that Mr. Scampini advised you personally in some conversation that in his opinion there was only one thing to do for the preservation of this company, and that was to cause a receiver to be appointed and consent to it?

A. We had a conversation about that very thing.

Q. Isn't it true that Mr. Scampini told you that the transaction [396] between the company and Mr. Peter Bercut was indefensible in law?

A. In your opinion.

Q. Isn't it true that I also told you that a receiver was the only proper person to attack such a transaction before the court?

A. That is correct.

Q. You consented to the appointment of a receiver because in your opinion as a director the company needed one; is that right?

A. That is right.

Q. You also consented to the appointment of a

(Testimony of Webb Richards.)

receiver with the idea in mind that whatever the rights the company had against Peter Bercut and others should be prosecuted; is that right?

A. Yes.

Q. You were trying to do your duty as a director; is that correct? A. Yes.

Mr. Scampini: That is all.

Mr. Brownstone: That is all.

LOUIS T. SAMUELS,

called for defendants; sworn.

Direct Examination

Mr. Naus: Q. You are a real estate broker in San Francisco? A. Yes.

Q. And have been continuously since when?

A. 1916.

Q. Now, in your continuous experience in that business since 1916 have you not dealt in downtown and commercial properties? A. I have.

Q. Would you indicate to his Honor some of the larger deals you have conducted, personally conducted, through those years, the larger ones?

A. You mean individual transactions?

Q. Yes, just a few of them to illustrate the type of activity [397] you have been engaged in.

A. Well, the sale of the City of Paris building, Geary and Stockton, the sale of the City of Paris building at Stockton and O'Farrell—I sold the in-

(Testimony of Louis T. Samuels.)

insurance Exchange Building at California and Sansome; I sold the property of the Financial Center Building at California and Montgomery; I sold the Bank of America at Powell and Eddy; the Techau Tavern property going over a period of years.

Q. Did you acquire some property for the Emporium?

A. I represented the Emporium in buying the block on Mission between Fourth and Fifth, at the rear of their present property.

Q. Those are simply some of the major items of the many items throughout the years?

A. There are more of them.

Q. I am just trying to give his Honor the picture of it.

The Court: Q. Where is your own building?

A. I still pay rent.

Q. Who owns the Emporium property?

A. The Parrott estate owns the property on Market Street, and then the Emporium bought up the block on Mission Street, and then when they entered into a new lease with the Parrott estate, the Parrott estate bought the property on Mission Street.

Mr. Naus: Q. Now, Mr. Samuels, you have prior to coming to court made a study of the property, lands and buildings of the Merchants Ice & Cold Storage Company, have you?

A. Yes.

(Testimony of Louis T. Samuels.)

Q. And would you indicate or describe to his Honor generally the property itself. I believe you have made a map, haven't you? A. Yes.

Q. Hand it to me and I will ask that it be marked as an exhibit and have it described. It is on three street blocks.

Mr. Pardini: On three blocks, that is correct.

The Court: It may be admitted and marked.

[398]

(The diagram was marked "Defendants' Exhibit L.")

Mr. Naus: Q. This is the diagram that you have prepared?

A. No, I did not prepare that.

Q. It has been prepared?

A. That was given to me as a diagram of the property. I did not prepare that.

Q. Have you or not compared that diagram with the property itself on the ground in your study of it? A. I have.

Q. The property is really an assembly of different units or buildings, isn't it? A. Yes.

Q. To describe the property you have to take up several separate building units; you have to break it up into parcels? A. Yes.

Q. Will you first of all give his Honor a description of the physical properties.

A. There were eight separate buildings, each different in character; so I took each of the units and valued them separately and then totaled them to arrive at a figure.

(Testimony of Louis T. Samuels.)

Q. Take them up one at a time and describe the type of building, its condition, and the like.

A. Well, the first one is a modern building, in good condition.

Q. Would you point it out to his Honor on the diagram, the one you are about to speak of now?

A. It is this building right here; that was constructed in 1924 or approximately that. That one is modern and in good condition, and I put that as the first; I started at that corner.

Q. Finish with your description.

A. It is a six-story building covering the entire lot. I think there is about 18 or 20 feet on what is since called Winthrop Street, which in 1941 was not yet improved. I will put my finger here, if I may. It is a six-story building; it is Class C, that is, wooden floors and wooden steps, but it has light steel frames, it [399] has two elevators, and is in excellent condition.

Q. Now, have you an opinion as to the value of the land and improvements as to that parcel?

A. My valuation of that land is \$19,850. I value the improvements at \$199,184, approximately \$200,000.

Mr. Naus: One moment, if your Honor please. I ask that this paper be marked for identification. It was prepared in typewritten form for convenience to your Honor, if your Honor wishes to follow it as he testifies.

The Court: It may be marked.

(Testimony of Louis T. Samuels.)

(The appraisal was marked "Defendants' Exhibit M for Identification.")

Mr. Naus: Q. What is the size of the lot involved in that parcel?

A. The lot is 183.4 feet on Lombard by 103 feet on Montgomery Street.

Q. Will you turn to the next parcel.

A. The next parcel I have got is southwest Lombard and Sansome Streets. That is this building here. There is one old building here, and this building was acquired since 1941. This is a three-story brick building.

Q. Before proceeding, Mr. Samuels, you were requested to make a study of the property and form an opinion of value as of January 8, 1941?

A. 1941, yes.

Q. So the opinions of value you are expressing are as of that date, is that correct? A. Yes.

Q. By the way, you have also had some photographs of some parts of the property taken, haven't you?

A. I had some photographs taken only of those that are in bad condition and showing what I am stressing. I did not have any photographs taken of this one. [400]

The Court: For the purpose of this case, let the witness go on and give the results of whatever he has done.

Mr. Naus: Q. Will you proceed, then, with parcel 2.

(Testimony of Louis T. Samuels.)

A. Parcel 2, that is the southwest corner of Lombard and Sansome Streets. The size of the lot is 137.6 by 137.6 feet.

Q. What in your opinion was the value of that land and improvements in January, 1941?

A. The value of the land was \$18,900, and the value of the improvements \$40,000, a total of \$58,900.

Q. Would you turn to the next parcel or unit and describe it and point it out to his Honor.

A. This is the corner; this is a six-story building on the south line of Lombard Street 137.6 feet west of Montgomery Street. It runs to a depth of approximately, I think, 150 feet there—127.6 by 150 feet.

Q. What is the type of the improvements?

A. It may be 148 or 147 feet, because another building comes against it.

Q. Describe the improvements on it.

A. The improvements are obsolete. The walls are cracked. This building shows evidence of being at least sixty years old, possibly a little older.

Q. What in your opinion was the value of the lot and improvements as of January 8, 1941?

A. The value of the land was \$18,750, and my conclusion arrived at as to the value of the improvements was \$57,500, a total value of \$76,250.

Q. Turn to the next unit or parcel and describe it and point it out to his Honor.

A. The next one is a one-story building, brick

(Testimony of Louis T. Samuels.)

walls and wood and tar-paper roof. This property is here; the street is not cut through.

Q. Describe the building.

A. This building is in good [401] condition. It was constructed about the same time as the new building, and this is a one-story brick building. Of course, it is the lightest, cheapest construction, such as you would have for a delivery depot, and there are eight small skylights in it. It has a wooden roof with tar-paper, but it is in good condition, and there is nothing that is at all obsolete about it. I understand it was constructed at the same time that the new building was; of this I am not sure.

Q. State your opinion of the value of the land and the improvements as of January 8, 1941.

A. The lot is only about 97 or 100 feet in depth, and I put the value of the lot at \$14,500. It has 145 feet frontage. I valued the improvements at \$25,000, or a total of \$39,500.

Q. Turn to the next parcel or unit and point it out to his Honor and describe the improvements.

A. This is a two-story frame building that was used as a bottling works by the former tenant. In 1941 that was very old, and, as I say, it was just a rough-finished bottling place.

Q. When you say a bottling place, you mean the old Globe Brewery?

A. Yes, the old Globe Brewery. I put the value of the land at \$4,500 and the value of the improvements at \$3,000.

(Testimony of Louis T. Samuels.)

Q. Turn to the next unit or parcel and point it out to his Honor and describe it.

A. There are three or four small sheet iron buildings in the court area inside, that might have been temporary, I don't know, and I put those four buildings on the map here.

The Court: Q. What is the value of that?

A. I put the value of the lot at \$2,000 and the value of the improvements at \$2,500, a total of \$4,500.

Q. What is the next one? [402]

Mr. Naus: Q. I notice the number 6, which is called Engineroom, inside property.

A. That also is inside property.

Q. Describe it.

A. I will have to look in my notes again and get the size. That is a building—that is an engineroom, and I believe that is very old. And then there is part of that that has been constructed at a later date, and it is 40 x 80. In other words, there is an old building to which there has been an addition, and that is used as an engineroom, and I valued the lot at \$4,750 and the improvements at \$12,500, making a total of \$17,250.

Q. I believe the next is parcel 8. Will you point that out to his Honor?

A. This is an entire square block; that is the block bounded by Sansome, Battery, Greenwich and Lombard Streets, that entire block.

Q. Describe that.

(Testimony of Louis T. Samuels.)

A. That block is not the size that the other blocks are. The other blocks are 275 x 400. This block is 275 x 255. I suppose it is cut off because of the Embarcadero.

Q. Describe the improvements.

A. It is the southwest corner of Battery and Lombard; 137.6 x 137.6 is improved with a three-story brick building, a part of which is now occupied by the offices. The building is about sixty years old. And the balance of the block is covered with improvements that are so dilapidated and sunken as to be definitely valueless except for a possible use to the present company. They are one-story and the walls are cracked, the buildings sunken, and it is very hard to put a value on it.

Q. State the value of the lot and the improvements of parcel 8.

A. The value of the lot I put at \$75,625, and the value of the improvements I put at \$50,000. I arrived at these values by putting \$40,000 for the value of this three-story building and [403] cost of the other buildings I put at \$10,000, making a value of \$125,625.

Q. You have brought with you some photographs of the exterior of the buildings? A. Yes.

Mr. Naus: I ask that these be marked as an exhibit.

The Court: They may be admitted.

(The photographs were marked "Defendants' Exhibit N.")

(Testimony of Louis T. Samuels.)

Mr. Naus: Q. Handing you Defendants' Exhibit N, Mr. Samuels, will you display those one at a time to the Judge.

The Court: I think I can look at them all together.

Mr. Naus: All right, hand them to his Honor.

The Witness: This is the one-story building that I am speaking of.

Mr. Naus: Hand them all over to the Judge and if the Judge wishes to know anything further about them he will ask you.

Q. These photographs were taken fairly recently, weren't they? A. Yes.

Q. About when?

A. Within the last three weeks.

The Court: Q. Locate this one for me on the map.

A. Let me get my bearings on this a minute. Here it is.

Q. It is the six-story building? A. Yes.

Mr. Naus: Q. Now, in arriving at your opinion of values there, Mr. Samuels, what did you take into consideration in reaching your opinion?

A. Well, I arrived at the value of the land and the buildings separately.

Q. What is the total value of the land and buildings separately?

A. I took the land and buildings separately.

Mr. Naus: I have taken each parcel and added them, and the land separately is \$158,875, and the

(Testimony of Louis T. Samuels.)

buildings separately is \$389,685, and the addition of the two is what he has, [404] \$548,000.

Q. Did you in arriving at the value of the land, for example, take into consideration other sales of comparable property at or near the time in question? A. I took nine or ten sales.

Q. Just answer Yes or No. A. Yes.

Q. Now, how many sales of comparable property at or near the time in question had you taken into consideration in reaching that value?

A. I took ten sales in comparatively the immediate vicinity.

Q. For convenience, have you got one of these ordinary city plats? A. Yes.

Q. Now, the sales are marked in color on that so that they can be seen quickly? A. Yes.

Q. Will you produce that? A. Yes.

Mr. Naus: I ask that that be marked.

(The map was marked "Defendants' Exhibit O.")

Mr. Naus: Q. Will you point out to his Honor the properties that you have taken into consideration or transactions in other properties. Just give me a description of them generally.

A. These that are marked in red are the properties in question. These are the sales that have been made.

Q. What are these two blocks?

A. I have marked them, 3, 4 and 5. No. 3 is northwest North Point and Stockton Streets. This

(Testimony of Louis T. Samuels.)

Mr. Naus: Q. Handing you Defendants' Exhibit N, Mr. Samuels, will you display those one at a time to the Judge.

The Court: I think I can look at them all together.

Mr. Naus: All right, hand them to his Honor.

The Witness: This is the one-story building that I am speaking of.

Mr. Naus: Hand them all over to the Judge and if the Judge wishes to know anything further about them he will ask you.

Q. These photographs were taken fairly recently, weren't they? A. Yes.

Q. About when?

A. Within the last three weeks.

The Court: Q. Locate this one for me on the map.

A. Let me get my bearings on this a minute. Here it is.

Q. It is the six-story building? A. Yes.

Mr. Naus: Q. Now, in arriving at your opinion of values there, Mr. Samuels, what did you take into consideration in reaching your opinion?

A. Well, I arrived at the value of the land and the buildings separately.

Q. What is the total value of the land and buildings separately?

A. I took the land and buildings separately.

Mr. Naus: I have taken each parcel and added them, and the land separately is \$158,875, and the

(Testimony of Louis T. Samuels.)

buildings separately is \$389,685, and the addition of the two is what he has, [404] \$548,000.

Q. Did you in arriving at the value of the land, for example, take into consideration other sales of comparable property at or near the time in question? A. I took nine or ten sales.

Q. Just answer Yes or No. A. Yes.

Q. Now, how many sales of comparable property at or near the time in question had you taken into consideration in reaching that value?

A. I took ten sales in comparatively the immediate vicinity.

Q. For convenience, have you got one of these ordinary city plats? A. Yes.

Q. Now, the sales are marked in color on that so that they can be seen quickly? A. Yes.

Q. Will you produce that? A. Yes.

Mr. Naus: I ask that that be marked.

(The map was marked "Defendants' Exhibit O.")

Mr. Naus: Q. Will you point out to his Honor the properties that you have taken into consideration or transactions in other properties. Just give me a description of them generally.

A. These that are marked in red are the properties in question. These are the sales that have been made.

Q. What are these two blocks?

A. I have marked them, 3, 4 and 5. No. 3 is northwest North Point and Stockton Streets. This

(Testimony of Louis T. Samuels.)

Mr. Naus: Q. Handing you Defendants' Exhibit N, Mr. Samuels, will you display those one at a time to the Judge.

The Court: I think I can look at them all together.

Mr. Naus: All right, hand them to his Honor.

The Witness: This is the one-story building that I am speaking of.

Mr. Naus: Hand them all over to the Judge and if the Judge wishes to know anything further about them he will ask you.

Q. These photographs were taken fairly recently, weren't they? A. Yes.

Q. About when?

A. Within the last three weeks.

The Court: Q. Locate this one for me on the map.

A. Let me get my bearings on this a minute. Here it is.

Q. It is the six-story building? A. Yes.

Mr. Naus: Q. Now, in arriving at your opinion of values there, Mr. Samuels, what did you take into consideration in reaching your opinion?

A. Well, I arrived at the value of the land and the buildings separately.

Q. What is the total value of the land and buildings separately?

A. I took the land and buildings separately.

Mr. Naus: I have taken each parcel and added them, and the land separately is \$158,875, and the

(Testimony of Louis T. Samuels.)

buildings separately is \$389,685, and the addition of the two is what he has, [404] \$548,000.

Q. Did you in arriving at the value of the land, for example, take into consideration other sales of comparable property at or near the time in question? A. I took nine or ten sales.

Q. Just answer Yes or No. A. Yes.

Q. Now, how many sales of comparable property at or near the time in question had you taken into consideration in reaching that value?

A. I took ten sales in comparatively the immediate vicinity.

Q. For convenience, have you got one of these ordinary city plats? A. Yes.

Q. Now, the sales are marked in color on that so that they can be seen quickly? A. Yes.

Q. Will you produce that? A. Yes.

Mr. Naus: I ask that that be marked.

(The map was marked "Defendants' Exhibit O.")

Mr. Naus: Q. Will you point out to his Honor the properties that you have taken into consideration or transactions in other properties. Just give me a description of them generally.

A. These that are marked in red are the properties in question. These are the sales that have been made.

Q. What are these two blocks?

A. I have marked them, 3, 4 and 5. No. 3 is northwest North Point and Stockton Streets. This

(Testimony of Louis T. Samuels.)

land was purchased by the United States Government within the last six months from the Beronio estate. There were 86,281 square feet. That was sold for \$120,000. The improvements were appraised by the Government on the Beronio estate at \$25,000, and the land as \$95,000. I might say this: that the Beronio estate were not satisfied with the Government's figure; there was a contest on this question.

[405]

Q. What was that per square foot?

A. That was \$1.05 a square foot after the contest.

Q. By the way, before going to the other parcels can you tell us approximately what basis per square foot you have used for land here on the Merchants Ice & Cold Storage property?

A. I used approximately \$1 a square foot, by taking into consideration all of the parcels of land that have spur track, corners and inside area.

Q. Take up the other sales. I think you said you had ten. You have described No. 3. Will you point out those to his Honor?

A. Here is one piece, No. 1, a portion of the block adjoining the Merchants Ice & Cold Storage Company. Might I say this so I won't be misunderstood: My brother owned this piece of property, and I have been handling it. My brother acquired it about forty years ago. That is immediately adjoining the building that has been called the Globe Brewery, and I sold that building to Mr. Bercut

(Testimony of Louis T. Samuels.)

about four or five months ago, the building and the improvements, for \$10,000.

Q. You mean to the Merchants Ice & Cold Storage Company?

A. I didn't know to whom I sold it. As a matter of fact, it was an agent that approached me on it. When I sold it, I didn't know to whom I sold it, but that lot was 68.9 by 91 feet. That is the only sale in which I was interested.

No. 2 is a recent sale for the Hastings estate about a year ago, within a few months of this period of time, the block bounded by Embarcadero, Jackson, Oregon and Drumm Streets, approximately 500 feet of street frontage, containing 17,000 square feet, together with a two-story brick improvement, which was very old, and that sold May 1, 1942 for \$14,500. The Hastings estate was the seller and John Rosenfeld Sons [406] the buyer. My office handled it, and that is on the Embarcadero. That was sold for as low as 70 cents per square foot with improvements.

The Court: Q. Go to your next piece.

A. The next one is the Beronio estate, seller, which I have mentioned.

The next one is the block bounded by North Point, Beach, Powell and Mason Streets, 114,000 square feet, sold by the Hibernia Bank to the United States Government for \$120,000. That is a little bit over \$1 per square foot.

Mr. Naus: Q. Where is that located?

A. North Point, Beach, Powell and Mason

(Testimony of Louis T. Samuels.)

Streets. That would be No. 4. Here it is; I have marked it.

Q. Now No. 5.

A. Northwest Mason and North Point. 275 x 255. Frontage 275 feet on North Point, 275 feet on Mason and 275 feet on Beach Street, 75,600 square feet. That sold with some improvements for \$79,500. George Brown was the seller and the United States Government the buyer. That is marked No. 5.

The Court: Q. How much a square foot is that?

A. Well, it is a shade under \$1 a square foot, because there were some improvements, but it was about \$1.03 including the improvements.

The next piece is the southwest corner of Beach and Taylor Streets; Southern Pacific, seller, United States Government, buyer; 128,000 square feet for \$125,000. That is a little over \$1 a square foot; I call it \$1.

Mr. Naus: Q. Where is that?

A. That is the southwest corner of Beach and Taylor Street; that is this one here, No. 6. You know the Government is running the spur track all the way [407] through there.

The Court: Q. Is that all?

A. No, I have some more, if you want them.

The Court: That is sufficient.

Mr. Naus: Q. I would like you, merely in the interest of time, to take a look at Defendants' Exhibit M for identification and state whether you have got the detail as to 7, 8, 9 and 10 on here.

A. Yes.

(Testimony of Louis T. Samuels.)

Q. Your testimony if given would conform to that?
A. Yes.

Mr. Naus: I will offer that in evidence.

(Defendants' Exhibit M for Identification was received in evidence.)

DEFENDANTS' EXHIBIT M

April 16, 1943

Mr. Peter Bercut
743 Market Street
San Francisco, California

Dear Sir:

In the opinion of the undersigned the values of the properties of the Merchants Ice and Cold Storage Co. listed below as of January 8, 1941 were as follows:

1. N.W. corner of Lombard and Montgomery sts., lot having a frontage of 183.4/10 feet on Lombard by 103 feet on Montgomery Street.

Value of lot.....	\$ 19,850.00	
Value of improvements.....	199,184.00	\$219,034.00

2. S.W. Lombard and Sansome sts. Size of lot 137.6 x 137.6 feet.

Value of lot.....	\$ 18,900.00	
Value of improvements.....	40,000.00	58,900.00

3. South of Lombard 137.6 feet West of Montgomery st. 6 story building. Size of lot 137.6 x approximately 150 feet.

Value of lot.....	\$ 18,750.00	
Value of improvements.....	57,500.00	76,250.00

(Testimony of Louis T. Samuels.)

4. S.E. corner Montgomery and Lombard sts. One story brick garage building. Size of lot approximately 145 x 100 feet.

Value of lot.....	\$ 14,500.00	
Value of improvements.....	25,000.00	\$ 39,500.00

5. West line of Sansome st. 68.9 feet North of Greenwich st. Two story frame building. Size of lot 68.9 x 80 feet.

Value of lot.....	\$ 4,500.00	
Value of improvements.....	3,000.00	7,500.00

6. Engine room—inside property.

Value of lot.....	\$ 4,750.00	
Value of improvements.....	12,500.00	17,250.00

7. Four small sheet iron buildings in court area inside.

Value of lot.....	\$ 2,000.00	
Value of improvements.....	2,500.00	4,500.00

Parcels #2 to #7 Are All in Block Bound by Lombard-Greenwich-Sansome and Montgomery Sts.

8. Block bound by Sansome-Battery-Greenwich and Lombard streets. Entire lot 275 x 275 feet—75,625 sq. ft.

Value of lot.....	\$ 75,625.00	
Value of improvements.....	50,000.00	125,625.00

Total Value of All Properties Listed Above.....	\$548,559.00
---	--------------

(Testimony of Louis T. Samuels.)

Resume:

No. 1.	N.W. Lombard and Montgomery sts.....	\$219,034.00
No. 2.	S.W. Lombard and Sansome sts.....	58,900.00
No. 3.	South Lombard, 137.6 West of Montgomery st.	76,250.00
No. 4.	S.E. Montgomery and Lombard sts.....	39,500.00
No. 5.	West Sansome 68.9 North of Greenwich st.	7,500.00
No. 6.	Engine room—inside property.....	17,250.00
No. 7.	4 small sheet iron buildings.....	4,500.00
No. 8.	Block bound by Sansome-Battery Green- wich and Lombard Streets.....	125,625.00
Total Value		<u><u>\$548,559.00</u></u>

Very truly yours,

LOUIS T. SAMUELS

Memorandum attached hereto explains in detail above valuation.

Parcel No. 1. Northwest Lombard and Montgomery streets. Winthrop Street was not open in March 1941. Improvements were erected in 1924. Have therefore deducted 34% for depreciation. Building is 6 story Class "C"—light steel frame—wooden floors.

Parcel No. 2. S. W. Lombard and Sansome Sts. 3 story brick—between 55-60 years in age—obsolete.

Parcel No. 3. South line of Lombard st. 137.6 feet West of Montgomery st. Also close to 60 years in age. Brick walls badly cracked throughout—roof in bad condition—obsolete.

Parcel No. 4. S. E. Lombard and Montgomery sts. Good condition—trussed roof—constructed in 1924.

(Testimony of Louis T. Samuels.)

Parcel No. 5. West line of Sansome st. 68.9 feet North of Greenwich st. Very old—improvements almost valueless.

Parcel No. 6. Northerly portion old—Southerly addition 40 x 80 feet—constructed around 1924.

Parcel No. 7. Four small sheet iron buildings very little value.

Parcel No. 8. Square block bound by Battery-Sansome-Lombard and Greenwich sts. Of this block S. W. Battery and Lombard is improved with a 3 story brick building—office on portion of ground floor. Balance storage and refrigeration. This building was also constructed about 60 years ago. Old and obsolete. Entire balance of square block with frontage of 275 feet on Sansome Street, 275 feet on Greenwich Street and 137.6 feet on Lombard Street is covered by a sunken, dilapidated one story building—outer walls cracked throughout—practically valueless. Figuring depreciation at 2% per annum (50 year life) the value of major portion of improvements might be deemed as wiped out. They still, however, retain some usefulness to present tenants.

As to land values: Have given consideration to those portions of land that have spur track—also corners and inside area—appraising land valuations. Quote the following sales to substantiate my land valuations.

1. N. W. corner of Sansome and Greenwich sts. portion of block—balance of which is owned by

(Testimony of Louis T. Samuels.)

Merchants Ice and Cold Storage Co.—size 68.9 x 91 feet with 2 story improvements—60 years old—sold August 4, 1942 to Merchants Ice and Cold Storage Co. for \$10,000.00.

2. Block bound by Embarcadero-Jackson-Oregon and Drumm sts. ~~having~~ approximately 500 feet of street frontage—containing 17,000 sq. ft.—together with 2 story brick improvements—sold May 1, 1942, for \$14,500.00. Hastings Estate, Seller. John Rosenfeld's Sons, Buyer.

3. N. W. North Point and Stockton Sts. . . . 3 frontages. 275 ft. on North Point—275 ft. on Stockton st.—and 275 ft. on Beach st. 86,281 sq. ft.—
land sold for.....\$ 95,000.00
improvements sold for..... 25,000.00

about \$1.05 per sq. ft. after contest.....\$120,000.00

Beronio Estate, Seller—U. S. Government, Buyer.

4. Block bound by North Point-Beach-Powell and Mason sts. 114,000 sq. ft. sold for \$120,000.00. Hibernia Bank, Seller—U. S. Government, Buyer.

5. N. W. Mason and North Point sts 275 x 275 ft. Frontage 275 ft. on North Point—275 ft. on Mason—and 275 ft. on Beach st. 75,600 sq. ft. Sold for \$79,500.00 including some improvements. George Brown, Seller—U. S. Government, Buyer.

6. S. P. to U. S. Government—128,000 square feet for \$125,000.00.

7. N. E. Union and Battery Sts. size: 155 x 150

(Testimony of Louis T. Samuels.)

feet—sold for 75¢ per square foot—July 25, 1942/ to Gus Lachman, Seller—U. S. Navy, Buyer.

8. S. W. Union and Front sts. 3 story concrete building—size: 70 x 125 ft, sold by McCreery Estate for \$25,000.00.

9. Two blocks facing Columbus Ave—bound by Bay-Francisco-Taylor and Mason sts. Sold to the Housing Board at \$1.00 per square foot—June 3, 1941.

10. Stockton and North Point. 27,000 sq. ft. sold for \$27,000.00. Bank of America, Seller—U. S. Government, Buyer.

None of the above properties were under financial pressure—each and every one was unencumbered. All of the properties excepting those sold to the government had been offered by willing sellers and sales were best prices obtainable. Sales to government were the result of appraisals by real estate experts.

In conclusion am familiar with every detail of the condition of this property as of January 8, 1941—as I personally handled the corner of Sansome and Greenwich sts. immediately adjoining these properties for an absent brother. Was repeatedly on the premises ~~in~~ during 1941 in an endeavor to lease or sell. Know the condition at that time and the improvements since made.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. M. Filed 5-7-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Louis T. Samuels.)

Cross Examination

Mr. Scampini: Q. Mr. Samuels, how long have you been in the real estate business?

A. Since 1916.

Q. Have you handled many industrial properties in your experience? A. Many.

Q. Have you had numerous transactions involving the sale of industrial properties?

A. I suppose I have had from sixty to eighty.

Q. Now, you are acquainted, of course, with the American Appraisal Company, aren't you? You know what that concern does, don't you?

A. No. I have heard the name, but I personally cannot say that I am acquainted with them. I know that there is a firm that makes appraisals.

Q. Is it a reputable concern, in your opinion?

A. I am not qualified to answer that.

Q. This six-story building, do you know when that was constructed?

A. You mean the new building—1924.

Q. Do you know at what cost it was constructed?

A. No. [408]

Q. Is it a good building?

A. It is in excellent condition.

Q. Now, if I were to tell you, Mr. Samuels, that in the year 1927 the improvements, not the land but the improvements with respect to which you have testified, with the exception of some minor items were appraised by the American Appraisal Com-

(Testimony of Louis T. Samuels.)

pany on two bases, cost of reproduction new—strike out that question.

Did you make any effort to appraise the machinery and equipment in these buildings?

A. Not at all.

Q. You don't know anything about that?

A. I am not qualified.

Q. Well, now, if I were to tell you that the six-story building—will you assist me in finding the appraisal of this six-story building in this volume?

Mr. Naus: As I remember it, Mr. Scampini, there is a diagram in there showing it.

The Court: We will take a short recess.

(After recess:)

Mr. Scampini: Q. Mr. Samuels, you brought some photographs here into the court. Who took those photographs?

A. Moulin is the name—Gabriel Moulin.

Q. Did you take any of the pictures yourself?

A. No.

Q. Were you there when they were taken?

A. Yes, I went with the photographer.

Q. Did you go around looking for cracks to photograph? A. Definitely, yes.

Q. Did you go around looking at all of the buildings? A. We went over all the buildings.

Q. Now, there are two six-story buildings on this property, aren't there? A. Surely. [409]

Q. You only brought pictures of one. Where is the other?

(Testimony of Louis T. Samuels.)

A. The other is in excellent condition.

Q. You just took a picture of the building that looked dilapidated; is that right? A. Yes.

Q. Now, the one that is in excellent condition is located on this piece of land designated as lots 11, 12 and 14 of the American Appraisal Company; is that correct? A. I don't know the numbers.

Q. The particular photograph of that building you did not take? A. No.

Q. This is the one that was built with the bond issue? A. I don't know anything about it.

Q. This is the building that is the most modern building of the lot?

A. This is the building I said was in excellent condition.

Q. If I were to tell you, Mr. Samuels, that the American Appraisal Company gave an aggregate sound value not of the land but just of the improvements and machinery in 1927 to all of these buildings, including the one which is in good condition, a photograph of which you did not take, of \$1,030,402.68 in 1927, would you think that was a reasonable appraisal?

A. I would still take these valuations.

Q. As of 1927? A. As of 1941.

Q. But would you say that in 1927 the reasonable value of these buildings and improvements of the land that you saw, with the exception of a few minor additions, would you say the reasonable value, reasonable sound value of \$1,030,000 was excessive in 1927?

(Testimony of Louis T. Samuels.)

A. Those figures would make no impression on me at all, those figures you have just given.

Q. Projecting yourself back to 1927, you were in business at [410] that time, weren't you?

A. I knew all of these properties as of 1927 as well as I do today.

Q. And would you say that a value of \$1,000,000 for all of the buildings in 1927 was excessive?

A. Is it necessary for me to pass judgment on somebody else's appraisal?

The Court: He is asking for your opinion.

Mr. Scampini: Q. I am asking your opinion.

A. I think they were ridiculous.

Q. In 1927?

A. Yes, ridiculously excessive.

Q. Are you generally familiar with construction engineering? A. Not engineering.

Q. Are you familiar with the cost of reproduction new of these buildings? A. Yes.

Q. If I were to tell you that the American Appraisal Company gave reproduction cost in 1927 of these buildings as \$1,200,000 and itemized it, would you say that was an excessive reproduction cost?

A. That would not change my conclusion at all.

Q. You say you are familiar with industrial property generally. Are you familiar with a piece of property on Bryant Street near Fourth, a copper and brass works, 200 feet by 150 feet, which is 30,000 square feet?

A. That is the northwest corner?

(Testimony of Louis T. Samuels.)

Q. That is 100 feet from the corner, 200 feet on Bryant. There are no spur tracks on Bryant Street, are there? A. No.

Q. As industrial property, would you say that that piece of property on Bryant 200 by 150 compares to Embarcadero property?

A. You are speaking of the market value, aren't you?

Q. I am.

A. You mean ground or improvements?

Q. Ground value.

A. As of last year or the present time?

Q. As of the present time or last year, would you say that [411] the Embarcadero industrial property was worth as much as the industrial property on Bryant Street without spur tracks?

A. No, Bryant Street is more salable.

Q. More salable? A. More demand for it.

Q. More demand for industrial purposes or for other purposes?

A. More buyers interested, more demand.

Q. Now, a cold storage plant on Bryant Street, from the point of view of cold storage, property on the Embarcadero would be worth more than Bryant Street, would it not?

A. No, Bryant has a greater selling price—not considerable, but I should say that Bryant Street would be worth maybe twenty-five or thirty per cent more than Sansome and Greenwich.

Q. How much more do you think it would be

(Testimony of Louis T. Samuels.)

worth than Embarcadero and Lombard, where the main building of this company is?

A. I just said there was a market of 70 cents a square foot at a place better than this because it approaches the Mission district, 17,000 square feet with twelve fronts that sold for \$14,500. It has been offered to the general market for three weeks for \$17,500, no buyers, then at \$16,500, and then we *made of* \$14,500 that was accepted by the Hastings estate in the last six months.

Q. Was this an empty building?

A. No, the building was dilapidated, but——

Q. Was there any revenue?

A. It has a two-story building, which is not in good condition—cracked walls—but there are 105 rooms which are bringing 125 a month, and there are eight stores, one on Drumm Street, bringing \$85—I know this, because I am collecting all the rents. There were three saloons on the Embarcadero. The eight stores are now vacant because the Government has stopped passage on the Embarcadero beyond [412] Jackson Street, but the rental would be \$350 a month.

Q. You sold it for how much? A. \$14,500.

Q. These buildings of the Merchants Ice & Cold Storage Company which you value roughly at about \$300,000, and the land at about \$200,000——

Mr. Naus: The buildings he has valued at \$389,000 and the land at \$158,000.

Mr. Scampini: Q. You know they are adequate

(Testimony of Louis T. Samuels.)

to accommodate the business of a company doing a gross revenue of \$800,000 a year, don't you?

A. I know nothing about the business at all.

Q. You are just valuing these buildings as if they were in a state of abandonment and you offer them for sale?

A. Not abandonment. We have a regular system by which we work and I would be glad to give it to you.

Q. Did you give much time to investigating this property?

A. I went over it very carefully, because I realized that I had to testify each conclusion that I arrived at.

Q. You are being paid for your services, aren't you?

A. I probably will be.

Q. The revenue on this piece of property which you sold for Hastings, you said, was approximately \$350 a month, you say?

A. I said the gross revenue was \$350.

Q. How much were the taxes on the property?

A. The taxes were approximately \$2,800—I will give it to you exactly—slightly under \$2,700 a year.

Q. That is a little over \$200 a month?

A. Almost \$225 a month.

Q. That has to be deducted, of course, plus insurance, from the revenue before you reach net revenue; is that right? [413]

A. Yes.

Q. You sold it to whom, a speculator?

A. I sold it to John Rosenfeld Sons.

Mr. Scampini: That is all.

PETER BER CUT,

recalled for defendants; previously sworn.

Direct Examination

Mr. Naus: Q. Mr. Bercut has already been called by the other side, so I do not propose to go over the ground already covered. Mr. Bercut, would you tell me, please, whether you attended as a director any actual meetings of the directors of Pacific Empire Holdings, Inc., actually held?

A. I do not think I attended any meeting since 1936 or somewhere around that time.

Q. So far as your memory or knowledge goes, you know of no meeting of the directors of the Pacific Empire Holdings, Inc. since 1936?

A. Not to my knowledge.

Q. Have you any memory or knowledge with respect to whether any meetings of the so-called executive committee of the Pacific Empire Holdings Company, Inc. were held? A. No.

Q. Have you any recollection of ever attending a single one? A. No.

Q. Now, with respect to the Merchants Ice & Cold Storage Company, the directors of that company did meet, didn't they? A. Yes.

Q. Now, turning to the time of the negotiations for the acquisition of this Merchants Ice & Cold Storage Company stock, did you personally study the balance sheets or did you have Mr. Evans make that study for you?

A. I had Mr. Evans do it. [414]

(Testimony of Peter Bercut.)

Q. Have you ever personally studied the balance sheets at any time? A. No.

Q. On this or any other matter? A. No.

Q. Now, there was a suggestion by Mr. Morrish about Mr. Arnold having said he did some special work for you. Did Mr. Arnold ever do any work for you, special or otherwise, at any time?

A. No.

Q. Were you and Mr. Arnold at any time ever close or very close friends, socially, in a business way or otherwise? A. No.

Q. Now, Mr. Bercut, after taking over the management of the Merchants Ice & Cold Storage Company did you personally do anything about this matter of going out into the business world and getting new business from merchants?

A. Yes.

Q. By the way, whether you had ever run a cold storage business before or not, had you been a user of cold storage for many years? A. Yes.

Q. For how many years?

A. Well, in our business, the meat business, you can't be in the meat business without having cold storage.

Q. You mean down at the Grant Market?

A. Yes.

Q. You handle an enormous tonnage of meat down there, don't you, and a large amount of cold storage? A. Yes.

Q. Now, during the years you have been in

(Testimony of Peter Bercut.)

business that way, had you for many years before the Merchants Ice & Cold Storage Company deal had personal and business contacts with the meat industry and packing industry? A. Yes.

Q. When you took over the management of the Merchants Ice & Cold Storage Company, just tell the Judge briefly what you personally did about bringing in new business for that company. [415]

A. Well, I went to the wholesale meat people that I was doing business with in my meat business and asked them to patronize me in the cold storage business, I was in that business, and assured them that I knew how to handle meat, keep it in a way like butchers handle it, see that it was in first class shape, that I had been in that business for the last fifteen or twenty years, and asked them to patronize the Merchants Ice, and I was very well respected. I met Mr. Swanson from Sacramento, who did a very large business with us, and before that he had done business for twenty years with the National Ice Company, and they said they would give all their business to Bercut, and it has been there ever since. And I had to go and see Swift & Company; Mr. White was the manager, and they were not putting any merchandise in with us for a time on account of the trouble that we had with the bank. And Mr. White told me he received orders from the main office in Chicago that they were to withdraw everything.

Q. You mean from the butter warehouse re-

(Testimony of Peter Bercut.)

ceipts, that the bank started to refuse to take the Merchants Ice & Cold Storage receipts as collateral?

A. Yes, they stopped putting meat in Merchants Ice & Cold Storage Company and continued withdrawal, so I gave him my personal guarantee that that would never occur with the Merchants Ice, and I succeeded in getting them back to the plant, and we did a large business with them. Then I got business with the Cudahy Meat Company over in Oakland; I succeeded in moving them over to the Merchants. Then I went to Washington and went to the Surplus Commodity Meat Commissioner and I assured him that the company would take care of merchandise and other business coming to the Coast, and when I got back there a car coming into the Merchants, and ever since [416] we have done a nice business, about fifty cars a month.

Q. As you went around to bring in this business, did you or not as you went around give personal promises that you would stand behind that business?

A. Yes, I gave my personal promise, but people knowing me usually trust me.

Q. Now, at or about the time that you took over the management, you remember the Bank of America brought suit on that butter deal for about \$40,000 against the Merchants Ice & Cold Storage Company, don't you? A. Yes.

Q. And they levied an attachment. You recall that circumstance, don't you? A. Yes.

Q. Isn't it a fact that the Bercut family person-

(Testimony of Peter Bercut.)

ally put up the attachment bond to release that attachment? A. Yes.

Mr. Naus: You may cross examine.

Mr. Scampini: No questions.

Mr. Naus: Defendants rest.

Mr. Scampini: We rest.

(Thereupon the case was submitted on briefs to be filed 10, 10 and 10, and placed on the calendar for June 23.) [417]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 312,800

THOMAS H. WINGATE, as Receiver in Equity
for PACIFIC EMPIRE HOLDINGS, INCORPORATED, a corporation of the State of Delaware; and PACIFIC EMPIRE HOLDINGS, INCORPORATED, a corporation of the State of Delaware,

Plaintiffs,

vs.

PETER BER CUT, ERNEST E. BER CUT,
HENRY BER CUT, JEAN BER CUT, MARY
DOE BER CUT, MARY JANE BER CUT,
FIRST DOE, SECOND DOE, THIRD DOE,
BLUE AND WHITE, a corporation, XYZ, a
copartnership,

Defendants.

DEPOSITION OF LEONA KEENER

Be It Remembered, that pursuant to stipulation between counsel for the respective parties, and on Saturday, the 3rd day of October, 1942, commencing at the hour of 11:00 o'clock A. M. thereof, at Room 816, No. 300 Montgomery Street, San Francisco, California, before me, Mary T. Collins, a Notary Public in and for the City and County of

(Deposition of Leona Keener.)

San Francisco, State of California, personally appeared

LEONA KEENER,

who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

A. J. Scampini, Esquire, appeared as attorney for the plaintiffs; and Louis E. Goodman, Esquire, and Louis H. Brownstone, Esquire, appeared as attorneys for the defendants Peter Bercut, Ernest E. Bercut, Henry Bercut and Jean Bercut.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be reported in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to, or by, the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the Notary

(Deposition of Leona Keener.)

Public, it shall be deemed that the Notary Public has so instructed the witness to answer, but that she still refuses to answer.

Mr. Goodman: I want to reserve the same objection that I made on the depositions of Mr. Arnold and Mr. Heer as to the legal capacity and right of the plaintiffs to maintain this action.

Mr. Scampini: Yes.

LEONA KEENER,

being duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Scampini: Miss Keener, your full name is what? A. Leona Keener.

Q. And where do you work now, Miss Keener?

A. At the Federal Outfitting Company.

Q. And what is your position?

A. I am the secretary for Mr. Shragge, the president.

Q. Do you expect to leave this city and county soon?

A. I am not sure—outside the city and county.

Q. You are not certain about it? A. No.

Q. In the event, of course, that you are residing

(Deposition of Leona Keener.)

here at the time of trial of this case, then of course we may subpoena you, but we are taking your deposition now in behalf of the plaintiffs, on the assumption that you may not be available as a witness.

A. Yes.

Q. And we are taking your deposition now in the case of Pacific Empire Holdings, Inc. vs. Peter Bercut and other defendants.

Now, were you employed at any time by Pacific Empire Holdings, Inc.?

A. Yes.

Q. In what capacity?

A. As secretary.

Q. By "secretary" you mean not the officially designated secretary—

A. No.

Q. But stenographer-secretary?

A. Stenographer-secretary, yes.

Q. And when did you cease your connection with the company?

A. On June 16th of this year.

Q. And how long were you with the company in that capacity?

A. Four years approximately.

Q. Do you know M. Maffei?

A. Yes, I do.

Q. Mr. Arnold?

A. Yes.

Q. Mr. Richards?

A. Yes.

Q. Mr. Ryerson?

A. Yes.

Q. Mr. Peter Bercut?

A. Yes.

Q. Were you acting as such stenographer-secretary on or about January 8th, 1941?

A. Yes.

Q. And as such do you recall anything unusual happening, or any dictation which took place at or about that time, or immediately prior or immedi-

(Deposition of Leona Keener.)

ately thereafter, concerning the resignation of Mr. Peter Bercut? A. Yes.

Q. And do you recall that incident?

A. I do recall it.

Q. Approximately when did it take place?

A. It was approximately in January—the latter part of January.

Q. Of what year? A. Of 1941.

Q. And what did take place? Tell us to the best of your recollection exactly what happened.

A. Mr. Bercut was in the office and asked me to dictate—or to dictate to me a resignation to the holding company as officer and director of that company.

Q. And did you take it in your notebook then at that time? A. Yes.

Q. And have you got that notebook with you?

A. Yes, I have. (Producing notebook.)

Q. Will you please find it—look at your notebook and see if you have any record of the dictation of Mr. Peter Bercut? A. I have it.

Q. And what is that notebook which you have in your hand now?

A. This is the notebook that I used for the holding company. This is from the year '41 I'm looking at right now.

Q. And what page are you looking at?

A. I don't quite understand you.

Q. I say what page of the notebook? Have you got the pages numbered? A. No, I haven't.

(Deposition of Leona Keener.)

Q. Well, do you find any record in that notebook which you have of the dictation of Mr. Peter Bercut to you concerning his resignation? A. Yes.

Q. And is it written in shorthand?

A. Yes, it is.

Q. And will you read it into the record, please?

A. Yes. (Reading from notebook.) By Peter Bercut to Pacific Empire Holdings.

"Because of the pressure of this business I will be unable to devote sufficient time to the company to be of real value. Consequently please consider this letter as my resignation as an officer and director of Pacific Empire Holdings, Incorporated."

Q. Have you got any notation on that page of the date on which the dictation was given to you?

A. The date was January 29th, '41.

Q. And who were present, so far as you recall, at the time the dictation took place?

A. Mr. Bercut and Mr. Arnold and myself.

Q. Was there any discussion between these parties in your presence, that you recollect?

A. Yes, there was. The resignation was dated back to, as my records show, March 3rd, 1940.

Q. And was anything said concerning that phase of the transaction or dictation, by any of the persons present?

A. Nothing, except to date it back.

Q. And who said to date it back, if you recall.

A. I couldn't say who said it.

Q. Did you date it back pursuant to instructions? A. Yes, I did.

(Deposition of Leona Keener.)

Q. And you afterwards transcribed the notes which you have just read into letter form, did you?

A. Yes.

Q. And what did you do with that letter?

A. Mr. Bercut signed it. I gave it to Mr. Bercut, and he signed it.

Q. And then what happened to the letter?

A. And then, as I recall, he turned it over to Mr. Arnold. I couldn't be definite on that.

Q. I see. Was any dictation given to you by Mr. Peter Bercut at that time or at any other time to your knowledge concerning resignation in the Pacific Empire Corporation?

A. Nothing at all; that is the only one I have.

Q. I see. That is all I want of you, except to identify the letter when I find it.

Cross Examination

Mr. Goodman: Q. Miss Keener, is that the only time that you ever took any dictation from Mr. Bercut?

A. Yes, to the best of my knowledge.

Q. That is, that one occasion?

A. Yes.

Q. And have you looked through your book to see whether or not you have any other letters or documents of any kind that were ever dictated to you by Mr. Bercut?

A. No, I didn't, because I am pretty sure—I am rather sure I haven't any.

Q. Your recollection is quite clear that this was the only occasion that any document was ever dictated to you by Mr. Bercut?

A. Yes, sir.

(Deposition of Leona Keener.)

Q. And have you any dictation in the book which you have with you, on January 29th, 1941, except this letter—except or besides this letter of Mr. Bercut's?

A. I have one here for the 28th, and the next is the 29th.

Q. Well, what I am trying to find out is, have you any other dictation in your book as of January 29th?

A. Yes, I have.

Q. On other subjects?

A. On other subjects.

Q. And who did that dictating?

A. Mr. Arnold.

Q. Is there anything—have you the date that you put on this letter in your notebook? Does the date appear there?

A. Yes, it does.

Q. May I see it, please?

A. Yes. That is March (indicating).

Q. Now, where does the writing continue from the column—I wonder whether we can have this marked?

Mr. Scampini: We will offer that into evidence—the book.

Mr. Goodman: Yes, and we will subsequently identify it; we will put a sticker on this page of some kind to identify it, so when I refer to it now we will know that that is the page that I am referring to.

Q. On the page of the notebook that is to be identified by the reporter, so we will know what

(Deposition of Leona Keener.)

page we are referring to, are two columns of shorthand work? A. Yes.

Q. Now, at the bottom of the right-hand column where do you continue your writing to?

A. To here (indicating).

Q. Now, at the bottom of the right-hand column of your notebook, this page, appears the word "Frostrcraft". A. Yes.

Q. With the date? A. Yes.

Q. And is that continued, then, on over onto the next page?

A. No, you see when the date is like this—it was probably something that was written back—the date of my notes appears like that (indicating).

Q. No, I think you don't understand what I am driving at. Is this the start of a letter down at the bottom?

A. No, that is merely a notation of my own.

Q. And what does that notation refer to? It says, "Frostrcraft June 1 '40."

A. Probably somebody asked me to look something up concerning Frostrcraft as of that date.

Q. Well, is there any connection between this notation "Frostrcraft June 1 '40" at the bottom of the second column of your notes on that page and the letter with reference to Peter Bercut?

A. None whatsoever.

Q. None whatsoever. And following after that notation "Frostrcraft June 1 '40", is there anything in your notes that has to do with the Frostrcraft? A. Nothing at all.

(Deposition of Leona Keener.)

Q. Now, after you finished this page where did you go? A. To here (indicating).

Q. Now, I notice that at the top of the next page of your notes, after the words—on the next page—that is, the page following the page that we have been referring to—appears “T. M. Ryerson”.

A. Yes.

Q. Now, what does that refer to?

A. That is a letter to Mr. T. M. Ryerson.

Q. That Mr. Arnold dictated? A. Yes.

Q. Now, is there anything that you can refer to in your notes which would recall to you what the notation “Frostcraft June 1 '40” refers to?

A. Nothing at all. That was just one of my ways—a reminder, to put something in my notes; something was probably asked for, and I just put it down so that I wouldn't forget it. You see, there is no shorthand after that. Next starts a letter.

Q. Now, just let me look at it, please. (Examining notebook.)

Now, you say that the date that you have read with respect to this letter which you took from Mr. Bercut refers to——

A. That is March—March 3rd, '40.

Q. Where does the “March” appear?

A. That is shorthand for “March.”

Q. Oh, you are referring to where the shorthand symbol for “March” appears? A. Yes.

Q. Now, what is this little mark after the words “Peter Bercut” in your notes?

(Deposition of Leona Keener.)

A. That is the way I end a letter and start another one. That is the end of this (indicating).

Q. Oh, I see. Now, up at the top it says "Peter Bercut." Now, what is the next shorthand notation after that?

A. That is dictated by Peter Bercut to the holding company.

Q. Who was present when Mr. Peter Bercut dictated that, as you say?

A. Mr. Bercut, Mr. Arnold and myself.

Q. And did Mr.—you said that Mr. Peter Bercut never dictated anything else at all at any time?

A. No, he never has.

Q. That is the only document or letter of any kind that he has ever dictated to you?

A. Yes.

Q. You are quite sure about that?

A. I certainly don't recall any other occasion that he ever dictated anything to me.

Q. And are you quite sure that you only did one letter that day which Mr. Bercut signed?

A. I really don't know. If there were any other resignations that day, it may have been that they just sent the same letter to the different companies.

Q. Have you any recollection of doing that?

A. I couldn't say definitely now. If I could look at the copies of the letters, I would know.

Q. On the next page, I have asked you about this letter to Mr. Ryerson. A. Yes.

Q. Does that letter to Mr. Ryerson have any-

(Deposition of Leona Keener.)

thing to do with the transaction with Mr. Bercut—
if you can still read your notes as to that?

A. I can read my notes. Nothing whatever.

Q. It has nothing to do with the Bercut transaction?

A. Nothing at all.

Mr. Scampini: What date does that letter bear?

A. This is the same date.

Mr. Goodman: The same date. I have already gone into that.

Q. Was it a personal matter or a business matter? I am not asking to be inquisitive. I just want to find out.

A. Yes. I am reading it over.

Q. I see.

A. It was another business matter. It had nothing to do with Mr. Bercut.

Mr. Goodman: I think that is all. I think you will have to mark that some way or other.

Mr. Scampini: Yes. I think we will have to adjourn this deposition to a convenient time so as to identify that letter, the original. I will ask that the notebook of Miss Keener be admitted in evidence as plaintiffs' exhibit next in order, and that the page from which Miss Keener read concerning the resignation of Mr. Bercut be marked for identification by the reporter.

Mr. Goodman: You had better put something on this to locate the place.

(Deposition of Leona Keener.)

Mr. Scampini: Yes, I will ask her to point it out to him so he can mark it.

Mr. Goodman: Where is it, now?

A. I will find it.

Mr. Scampini: Will you just point out to the reporter exactly where that letter starts, and we will get photostatic copies.

A. Yes. (Putting rubber band on notebook.)

(Notebook marked "Plaintiffs' Exhibit No. 1.")

Mr. Scampini: Now, we will have to find that original letter, and I will call you and let you know; it will take very little time—just to identify it, if you can.

A. Yes. And let me know two or three days in advance.

Mr. Scampini: Yes. And you let me know in case you can't arrange it, so we can work it out some way.

A. Yes.

Mr. Scampini: That is all.

Mr. Goodman: That is all.

Mr. Scampini: Thank you very much for your courtesy.

(Thereupon an adjournment was taken to a time to be mutually agreed upon between counsel.)

(Deposition of Leona Keener.)

Room 816, No. 300 Montgomery Street,
San Francisco, California,

Monday, October 12th, 1942, 10:00 A. M.

(Pursuant to adjournment, at the above time and place, the following proceedings were had, there being the same appearances as hereinbefore noted.)

Mr. Scampini: Now, Mr. Goodman, this is in the Pacific Empire Holdings Company deposition of Miss Keener. We never did close that deposition, due to the fact that we could not find the original letter of resignation of Mr. Bercut, which is "Plaintiffs' Exhibit No. 4" on the deposition of Mr. Arnold. Will it be stipulated, Mr. Goodman, that this copy of the exhibit which is in Mr. Arnold's deposition, and which is the one that has been lost, if exhibited to Miss Keener, would be identified by her, other than the signature, as being the letter of resignation which she testified was typed out by her on or about January 28th, 1941, and delivered by her to Mr. Bercut, who thereupon signed it and delivered it to Mr. Arnold? (Showing paper to Mr. Goodman.)

Mr. Goodman: I will stipulate this is a copy of the original document.

Mr. Scampini: Yes.

Mr. Goodman: And that it may be deemed admitted as if it were the original.

(Deposition of Leona Keener.)

Mr. Scampini: All right.

Mr. Goodman: With the same force and effect, but I don't want to stipulate the other things that you say, because I don't know whether or not—

Mr. Scampini: Well, she testified in her deposition that she typed out the letter, and she read it from her notes, and it is exactly in haec verba the letter which she read. So in lieu of the original, I will offer this into evidence.

Mr. Goodman: There will be no objection.

Mr. Scampini: And shall we deem the deposition of Miss Keener, then, to be closed?

Mr. Goodman: Yes.

Mr. Scampini: Very well.

Mr. Goodman: I have no further questions.

LEONA KEENER

Handwritten notes on the left page, including a circled 'X' and various illegible scribbles.

Handwritten notes on the right page, including a circled 'X' and various illegible scribbles.

Peter Bernick 13/40

Anthony June 1 '40

(Deposition of Leona Keener.)

PLAINTIFFS' EXHIBIT 2

(Copy)

March 31, 1940

Pacific Empire Holdings, Inc.,
26 O'Farrell Street,
San Francisco, California.

Gentlemen:

Because of the pressure of other business, I will be unable to devote sufficient time to the company to be of real value.

Consequently, please consider this letter my resignation as an Officer and Director of Pacific Empire Holdings, Inc.

Yours very truly,

PETER BER CUT

PB/lk

[Endorsed]: Plff's Ex. No. 2. R. R. Roberson,
Reporter.

State of California,
City and County of San Francisco—ss.

I, Mary T. Collins, a Notary Public in and for the City and County of San Francisco, State of California, do hereby certify:

That the witness in the foregoing deposition named, Leona Keener, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said

(Deposition of Leona Keener.)

deposition was taken at the time and place therein named; that the testimony of said witness was taken down in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and by him thereafter reduced to longhand typewriting, under my supervision, and when completed, was carefully read to, or by, the said witness, and, being corrected by her in every particular she desired, was by her thereafter duly subscribed.

And I further certify that I am not of counsel or attorney for either of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 26th day of October, one thousand nine hundred and forty-two.

[Notarial Seal]

MARY T. COLLINS,

Notary Public in and for the City and County
of San Francisco, State of California.

My Commission expires March 30, 1945.

[Endorsed]: Filed Apr. 21, 1943. Walter B. Maling, Clerk.

In the Superior Court of the State of California,
in and for the City and County of
San Francisco

No. 312,800

THOMAS H. WINGATE, as Receiver in Equity
for PACIFIC EMPIRE HOLDINGS, IN-
CORPORATED, a corporation of the State of
Delaware; and PACIFIC EMPIRE HOLD-
INGS, INCORPORATED, a corporation of
the State of Delaware,

Plaintiffs,

vs.

PETER BER CUT, ERNEST E. BER CUT,
HENRY BER CUT, JEAN BER CUT, MARY
DOE BER CUT, MARY JANE BER CUT,
FIRST DOE, SECOND DOE, THIRD DOE,
BLUE AND WHITE, a corporation, XYZ, a
copartnership,

Defendants.

DEPOSITION OF LLOYD R. ARNOLD

Be It Remembered, that pursuant to stipulation
between counsel for the respective parties, and on
Thursday, the 17th day of September, 1942, com-
mencing at the hour of 2:00 o'clock P. M. thereof,
at Room 816, No. 300 Montgomery Street, San
Francisco, California, before me, Mary T. Collins, a
Notary Public in and for the City and County of

(Deposition of Lloyd R. Arnold.)

San Francisco, State of California, personally appeared

LLOYD R. ARNOLD,

who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

A. J. Scampini, Esquire, appeared as attorney for the plaintiffs; and Louis E. Goodman, Esquire, and Louis H. Brownstone, Esquire, appeared as attorneys for the defendants Peter Bercut, Ernest E. Bercut, Henry Bercut and Jean Bercut.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be reported in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to, or by, the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the Notary

(Deposition of Lloyd R. Arnold.)

Public, it shall be deemed that the Notary Public has so instructed the witness to answer, but that he still refuses to answer.

Mr. Scampini: Will it be stipulated, Mr. Goodman, that the deposition of L. R. Arnold is being taken on behalf of the plaintiffs pursuant to the usual stipulations, and that we are reserving all objections as to the form of the question—

Mr. Goodman: Except as to the form.

Mr. Scampini: (Continuing:) —except as to the form, rather, the objections to be presented at the time of the trial for ruling, if necessary; and that the Notary may swear the witness and that she may thereafter retire?

Mr. Goodman: Yes.

Mr. Scampini: And will it also be stipulated that if any of the questions are objected to and the witness refuses to answer, that the Notary would nevertheless direct the witness to answer, and that he still refuses to answer—all the usual stipulations?

Mr. Goodman: Yes, that is satisfactory.

Mr. Scampini: Now, Miss Collins, will you please swear the witness?

(The Notary Public administers the oath to the witness.)

Mr. Goodman: Mr. Reporter, will you please note, before we proceed with the taking of the depo-

(Deposition of Lloyd R. Arnold.)

sition, that the appearance by the defendants is without prejudice to their rights, and reserving the right to object to the maintenance of this suit, and without waiving any objection as to the capacity of the plaintiff or plaintiffs to maintain the action?

Mr. Scampini: Yes. I expected such a move. The reservation is perfectly in order.

LLOYD R. ARNOLD,

being duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Scampini: Q. Mr. Arnold, your full name is Lloyd R. Arnold? A. That is correct.

Q. And where do you presently reside, Mr. Arnold? A. 1980 Washington.

Q. And do you expect to be leaving the City and County of San Francisco shortly?

A. I hope to, yes.

Q. In the event that you should leave, will you keep us all advised as to your whereabouts, so that in the event any deposition is desired by either side the proper arrangements can be made?

A. I will, fully.

Q. Now, what is your present connection with Pacific Empire Holdings, Incorporated?

A. Well, I believe I am still vice-president and secretary.

(Deposition of Lloyd R. Arnold.)

Q. And are you a director?

A. Also a director.

Q. When did you first become connected with Pacific Empire Holdings?

A. Well, I'd say in 1929, I believe, the latter part—the first part of 1930.

Q. What was the name of the corporation at that time?

A. That was the Associated Calitalo Holdings, Ltd., Incorporated.

Q. Was it incorporated under the laws of Delaware? A. Delaware.

Q. And did the corporation Associated *Calito* Holdings thereafter, by procedure according to the laws of Delaware, change its name—its corporate name? A. It did change it to——

Q. Pacific Empire?

A. Pacific Empire Holdings, Incorporated. That was by amendment to the articles.

Q. It was still, however, the same corporation? Is that right? A. The same corporation.

Q. Did you know Peter Bercut when you first became associated with Pacific Empire Holdings or its predecessor, by name?

A. I don't believe that I knew him, no. I knew of him. I probably didn't actually make his acquaintance until whenever I first attended a Board meeting.

Q. Was he then connected with the corporation?

A. I believe he was.

(Deposition of Lloyd R. Arnold.)

Q. Do you recall what post, if any, he held at the time?

A. I am pretty sure he was a director at the time.

Q. Now, I show you here what appear to be Volumes I, III, IV and V of minute books (showing books to the witness), and incidentally—this is off the record.

(Unreported discussion.)

Q. I will ask you to take a look at Volume I of what appear to be the minute books of Associated *Calito* Holdings, Ltd., Incorporated, and ask you whether or not you recognize that and can testify as to whether or not it is the minute book of said corporation?

A. I can, yes.

Q. When did you first see that minute book?

A. Well, when I became secretary of the holding company.

Q. And when was it, Mr. Arnold, that you first became secretary of the holding company?

A. Without looking it up, why, I would say it was about 1933, I believe.

Q. Was the book that you now have in your hand delivered to you at that time as secretary of the corporation?

A. Yes, it was. I took over all the duties of secretary.

Q. Did you thereafter keep the minutes?

A. I did.

Q. Of the corporation?

A. I did.

(Deposition of Lloyd R. Arnold.)

Q. Now, I show you what appear to be Volumes III, IV and V of the same corporation, except as to its subsequent change of name, and ask you to look at them and see whether or not you identify them as the books which were kept by you as the minute books?

A. Yes, those are the minute books, yes. There is one missing there. That is over there—it must be.

Mr. Scampini: Volume II. Now, Mr. Reporter, will you please mark the minute books for the purpose of identification as “Plaintiffs’ Exhibit No. 1.”

(Said minute books marked “Plaintiffs’ Exhibits 1-A, 1-B, 1-C and 1-D.”)

Mr. Scampini: Q. Now, Mr. Arnold, at the beginning of Volume I of the minute books, you have what purports to be a copy of the articles of incorporation of Associated Calitalo Holdings, Ltd., Incorporated, together with amendments thereto, running from pages 1 to 20, inclusive, of Volume I of the minute book; and I will ask you whether or not the copy of the articles together with the amendments thereto found in this minute book are to your personal knowledge true and correct copies of the articles of incorporation?

A. They are correct. They were taken from the—I didn’t prepare those there, but they were taken from the certified articles we have in our files, yes.

Q. They have been in your files. All right. Then beginning with page 21 of Volume I, and ending with page 41, you have what purports to be a copy

(Deposition of Lloyd R. Arnold.)

of the by-laws of the corporation. Have you examined these by-laws?

A. I have from time to time, yes.

Q. Are these true and correct copies of the by-laws of the corporation?

A. To the best of my knowledge they are, yes.

Q. And on page 42 you have what appear to be amendments to the by-laws of the corporation?

A. Yes, that is a recapitulation—amendments that have been made subsequently.

Q. That is up to 44—pages 42 to 44 inclusive. Do they contain, to the best of your knowledge, all the amendments to the by-laws of the corporation?

A. They should, if they are kept up to date. I can't recall any after this. This is 1936. They should be all recapitulated there, but by chance some might have been missed.

Q. Now, at the time that you became connected with the company, do you recall whether or not the company at that time owned a block of shares in the Merchants Ice & Cold Storage Company, a California corporation?

A. When I came with the company, I don't believe that it owned it, no—I don't believe that it owned any shares in any degree of Merchants.

Q. Do you recall any subsequent acquisition of any shares in the Merchants Ice & Cold Storage Company by the company during this period?

A. That was just about the time I was coming

(Deposition of Lloyd R. Arnold.)

in, I would say, in nineteen—when I was made an officer of the company.

Q. Yes. A. 1933, I believe.

Q. Do you recall from whom the company acquired the shares of stock of Merchants Ice & Cold Storage Company?

A. Yes, it was acquired from a syndicate composed of four or five individuals.

Q. Can you name them?

A. I will make an attempt.

Q. Yes.

A. George Stratton, Frederick Vincent, a man by the name of Swanberg; Sherman—William A. Sherman; and I think a man by the name of McInerney.

Q. Joseph I. McInerney?

A. Joseph McInerney. I don't remember what his middle initial was.

Q. How about Florence Stratton?

A. Well, I don't believe as a part of that syndicate there. That came in later, I think.

Q. Now, at the time that this block of stock was acquired, was Peter Bercut, to the best of your knowledge, connected with the company, the Pacific Empire Holdings? A. I believe he was.

Q. I now show you what appears to be——

A. Bear in mind I just came to the company about that time. I would have to look at the minute book to verify that, but I assume he was.

Q. I now show you what appears to be the an-

(Deposition of Lloyd R. Arnold.)

nual meeting of stockholders of Associated Calitalo Holdings, Ltd.—the minutes of the meeting held at Wilmington, Delaware, on Wednesday, February 15, 1933, wherein it appears that you acted as secretary of the meeting, Mr. Arnold, and I will ask you whether or not you recall that meeting?

A. Yes, I recall that. That is Delaware. I think that was where I had to make a trip back there for that purpose.

Q. And I will ask you to look at the minutes on pages 66, 68, 69, and state whether or not you recall the election of Mr. Peter Bercut as a director of the corporation at said meeting. Is that your signature at the bottom? A. That is my signature.

Q. Who were elected directors at that meeting?

A. That was M. Maffei, L. R. Arnold, A. A. Heer, James Bernardini, and Luigi Giachino, Peter Bercut, and George Hope.

Mr. Goodman: George Hope?

A. Hope—H-o-p-e. That is Dr. George Hope.

Mr. Scampini: Q. I now ask you if you look at the minutes of a special meeting of the Board of the Associated Calitalo Holdings, Ltd. on March 2nd, 1933, the organization meeting following the meeting concerning which you have just testified, upon which it appears that you acted as secretary for said meeting. A. That is right.

Q. State whether Mr. Peter Bercut was elected to any office at said meeting?

A. He was elected second vice-president.

(Deposition of Lloyd R. Arnold.)

Q. Who was elected president?

A. Mr. Maffei was president.

Q. And who was——

A. A. A. Heer first vice-president; Peter Bercut second vice-president; and L. R. Arnold secretary-treasurer.

Q. Was an executive committee appointed at said meeting?

A. Yes, an executive committee was appointed.

Q. Consisting of whom?

A. M. Maffei, L. R. Arnold, and A. A. Heer.

Q. I will now ask you to take a look at page 166 of the minute book, purporting to be the minutes of the annual stockholders' meeting held in 1934 at Wilmington, Delaware, at which meeting you appear to be secretary, and ask you whether or not you recognize those minutes and recall that meeting?

A. Yes, I recall this.

Q. Who were elected directors at that meeting?

A. It is the identical Board, the same as the previous.

Q. As you have previously testified?

A. Yes.

Q. By the meeting of 1933—is that right?

A. That is right.

Q. Now, at the next organization meeting of the Board, the minutes found on page 175, who were elected officers?

A. M. Maffei, president; A. A. Heer, Jr., first vice-president; Peter Bercut, second vice-president; and L. R. Arnold, secretary-treasurer.

(Deposition of Lloyd R. Arnold.)

Q. And when was that meeting held?

A. That was held on February 19th, 1934.

Q. Was an executive committee appointed?

A. The same executive committee—M. Maffei, Arnold and Heer—that I have testified to before.

Q. Now, will you take a look at page 38 of Volume IV of the minute books, which deals with the annual stockholders' meeting held Friday, the 15th day of February, 1935, and state who were elected directors at said meeting.

A. That is the identical Board.

Q. As the one that had previously been serving—is that correct? A. That is correct.

Q. Now, at the organization meeting of said Board, held February 19th, 1935, who were elected officers?

A. M. Maffei, president; L. R. Arnold, first vice-president and secretary; Peter Bercut, second vice-president, and A. A. Heer, Jr., treasurer and assistant secretary.

Q. And who were elected members of the executive committee?

A. The executive committee was M. Maffei, L. R. Arnold and Peter Bercut.

Q. Now, I want you to take a look at the minutes found on pages 52 and 53, and ask you whether or not you recognize the signatures of the persons who appear to have approved those minutes found on pages 52 and 53 thereof?

A. Yes, I recognize them.

(Deposition of Lloyd R. Arnold.)

Q. Whose signatures are on page 53?

A. I acted as secretary, and M. Maffei was chairman of the committee. I signed again as a member, and Peter Bercut signed as a member.

Q. And that is Mr. Peter Bercut's signature?

A. Yes.

Mr. Goodman: That is an executive committee meeting, is it?

Mr. Scampini: That is an executive committee meeting, yes.

Mr. Goodman: What date was it?

Mr. Scampini: That was Wednesday, May 8th, 1935.

Q. Now, will you examine those minutes and state whether or not you recall the transaction therein referred to dealing with a certain transaction with Joseph I. McInerney and Pacific Empire Corporation? A. Yes, I recall that.

Q. You recall that transaction, wherein and whereby—— A. I recall the transaction.

Q. Was the transaction referred to in those minutes, approved by the executive committee, thereafter consummated? A. Yes, it was.

Mr. Goodman: May I see that? (Examining minute book.)

Mr. Scampini: Q. Now, will you examine the exhibits—Exhibit A, which is found on pages 54, 55 and 56, together with a memorandum of securities pledged, entitled, "Stock of Merchants Ice & Cold Storage Company" and "Stock of Pacific National

(Deposition of Lloyd R. Arnold.)

Bank of San Francisco," found on page 58, and state whether or not that is a copy of the contract authorized to be executed by the minutes of the executive committee meeting concerning which you have just testified, held May 8th, 1935?

A. It must be. Let me see it. (Examining minutes.) Yes, that is right—that is correct.

Q. Now, were those shares of stock referred to in Exhibit A, found in the minutes there, at that time the property of the Merchants Ice & Cold Storage Company—of Pacific Empire Holdings?

A. Yes, they were.

Q. What is the date of that meeting there, Mr. Arnold?

Mr. Goodman: May 8th, 1935.

A. May 8th, 1935.

Mr. Scampini: All right.

Q. I now show you here a document entitled "Assignment by way of pledge," entered into between Pacific Empire Corporation and Pacific Empire Holdings, with respect to 49,944 $\frac{1}{3}$ shares of common stock and 3,990 shares of preferred stock of Merchants Ice & Cold Storage Company, and ask you to look at it and state whether or not that is the original agreement of pledge referred to in those minutes? (Showing document to the witness.)

A. Yes, that is correct.

Q. That is the original—is that right?

A. That is the original.

Q. And is that your signature found on that?

(Deposition of Lloyd R. Arnold.)

A. That is my signature on that.

Q. Are those the seals of both corporations on that?

A. Yes, that is right.

Q. And what position did you hold with the Pacific Empire Corporation at that time?

A. The Pacific Empire Corporation?

Q. Yes.

A. I wasn't with the Pacific Empire Corporation.

Q. Weren't you then? A. No.

Q. Do you know what Pacific Empire Corporation was at that time?

A. Well, it was about a 52 or 55% owned subsidiary.

Q. Of what?

A. Of Pacific Empire Holdings.

Q. And Pacific Empire Corporation was a California corporation?

A. Yes, a California corporation.

Q. And at that time—that is, the date upon which this contract bears date—you say that a majority of its outstanding capital stock was owned by Pacific Empire Holdings? Is that right?

A. That is correct.

Q. Do you know who were the officers of the corporation, the Pacific Empire Corporation, at that time?

A. M. Maffei was president and A. A. Heer was secretary. I am trying to think of who the vice-

(Deposition of Lloyd R. Arnold.)

presidents were. I believe Mr. Bercut was a vice-president. I would have to look it up.

Q. Do you know who the directors were?

A. The directors were M. Maffei, A. A. Heer, Peter Bercut, Webb Richards, and the fifth one I can't say.

Q. Was Mr. Scampini a director of the Pacific Empire Corporation at that time?

A. You were a director at one time. I didn't know whether you had resigned at that time or not.

Q. I resigned directly afterwards—or shortly afterwards. At any rate, you do recall that Mr. Peter Bercut was a director of that company?

A. Yes, he was a director.

Q. And you don't know for sure whether he was an officer of the Pacific Empire Corporation?

A. I don't know for sure. I would have to look that up.

Mr. Scampini: Now, I will ask that this be marked "Plaintiffs' Exhibit 2" for purposes of identification.

(Said document marked "Plaintiffs' Exhibit 2 for identification.")

Q. Now, Mr. Arnold, pursuant to this assignment by way of pledge, executed by Pacific Empire Holdings, Inc., in favor of Pacific Empire Corporation, do you know whether or not the shares of stock therein referred to were delivered over and placed on pledge with the Pacific Empire Corporation?

(Deposition of Lloyd R. Arnold.)

A. I don't recall the incident, but I assume they should have been—they would have been.

Q. Now, I will ask you to take a look at the minutes found on pages 64 and 65 of Volume IV of the minute books, and ask you whether you recognize the signatures of the assenting members of the executive committee?

A. Yes, I do.

Q. Who are they?

A. Mr. Maffei, L. R. Arnold, and Peter Bercut.

Q. Will you please read the minutes, or look at them, and state whether or not you recall the authentication found therein to borrow the sum of \$50,000.00 from the Pacific Empire Corporation?

Mr. Goodman: What is the date of that?

A. That is May 17th, 1935. Yes, I do.

Mr. Scampini: Q. And was the money thereafter borrowed from the Pacific Empire Corporation by Pacific Empire Holdings?

A. Yes, that and more.

Q. And more. And were the shares of stock described in this assignment by way of pledge, which is now Exhibit 2 for identification, these shares of stock delivered to the Pacific Empire Corporation as security for the payment of that \$50,000.00 and any other borrowings that may thereafter have taken place?

A. I didn't get the finish of that sentence there.

Q. I will withdraw the question and see if I can make it clear. Were the shares of stock re-

(Deposition of Lloyd R. Arnold.)

ferred to in the agreement entitled "Assignment by way of pledge"— A. Yes.

Q. (Continuing) —which were by this agreement pledged to Pacific Empire Corporation—were they turned over to the Pacific Empire Corporation as security for the repayment of this sum of \$50,000.00?

A. Yes, that was the purpose of it.

Q. That was the purpose of it. Now, I will ask you whether or not you recall, as a director of the Pacific Empire Holdings, and vice-president and secretary, whether or not the holding company ever thereafter borrowed any additional sum from Pacific Empire Corporation?

A. Oh, yes, we did.

Q. And as of, say, July 1st, 1942, approximately how much was the indebtedness of Pacific Empire Holdings to Pacific Empire Corp.?

A. I don't know about the exact date, but it has always been up above, in recent years, a hundred thousand; it must have been up around a hundred and fifty thousand, I guess.

Q. Now, did the holding company ever pay the Pacific Empire Corp. at any time its indebtedness then owing from the very beginning, when you borrowed this \$50,000.00, right down to the present date?

A. No, other than we may have made payments, you know. I don't know, but we certainly didn't pay——

(Deposition of Lloyd R. Arnold.)

Q. Did Pacific Empire Corp. ever release to Pacific Empire Holdings its pledge created by virtue of this assignment which was given to it to secure the payment of money borrowed by it from the holding company?

Mr. Goodman: Just a minute. I will object to that as going to the form of the question, on the ground it calls for the opinion and conclusion of the witness.

Mr. Scampini: Well, all right. That can be proven from the other end of it anyway.

Q. I will now ask you, Mr. Arnold, to take a look at the minutes found on page 119 of Volume IV, which deals with the stockholders' meeting of the corporation, which appears to have been held, under your signature, on the 15th day of February, 1936. The minutes begin at page 114 and end at page 119. Will you please state who were elected directors for the ensuing year of Pacific Empire Holdings? A. The same Board.

Q. The same Board?

A. That I have listed before.

Q. Will you now take a look at the organization meeting of this Board, which took place on February 19th, 1936, and state who were elected officers and members of the executive committee?

A. The officers were M. Maffei, president; myself, first vice-president and secretary; Peter Bercut, second vice-president; and A. A. Heer, Jr., treasurer and assistant secretary. The executive

(Deposition of Lloyd R. Arnold.)

committee was the same, M. Maffei, L. R. Arnold, and Peter Bercut.

Q. I will now ask you to take a look at the minutes which appear—the minutes of the annual meeting of stockholders held on February 15th, 1937, the minutes beginning on page 176, and ending on page 180 of Volume IV, and state whether or not—state who were elected directors at that meeting for the ensuing year?

A. It looks like there was a change here. Do you want me to list them all here?

Q. Yes.

A. There is one difference. Maffei, Arnold, Heer, Bernardini, Giachino, Bercut and Ryerson.

Mr. Goodman: Ryerson instead of Hope?

Mr. Scampini: Yes, Ryerson instead of Hope.

Q. Now, take a look at the following minutes dealing with the organization meeting of the board of directors held——

A. March 10th.

Q. March 10th, 1937.

A. 1937, yes.

Q. And state who were elected officers and members of the executive committee?

A. The officers were the same—M. Maffei, president; L. R. Arnold, first vice-president and secretary; Peter Bercut, second vice-president; A. A. Heer, treasurer and assistant secretary. The executive committee is the same—Maffei, Arnold and Bercut.

Q. I will ask you to take a look at page 1 of Volume V, which appears to be a waiver of notice of special meeting of the board of directors of Pa-

(Deposition of Lloyd R. Arnold.)

cific Empire Holdings, Incorporated, calling a meeting on June 15th, 1937, and ask you to look at the signatures appearing thereon and see if you recognize Peter Bercut's signature there?

A. Yes, I do.

Q. Now, I will ask you to take a look at the minutes which are found on—the minutes of the executive committee meeting held July 22nd, 1937, at 26 O'Farrell Street, and ask you whether or not you recall that meeting, and whether or not the signatures appearing thereunder as members of the executive committee approving said minutes—whether you will find among them Peter Bercut's signature?

A. The signatures are all right. I can see that. I don't know whether I recall the meeting. Let's see. (Examining minute book.)

Q. You recall that meeting? A. Yes.

Q. Now, take a look at page 23, which deals with the minutes of the annual meeting of stockholders held on February 15th, 1938, and ending on page 28, and state who were elected directors for the ensuing year?

A. Now, there is another change here, apparently. M. Maffei, Heer, Arnold, Giachino, Richards—Webb Richards takes—

Q. Bernardini's place?

A. Bernardini's place, yes; Peter Bercut; T. M. Ryerson.

Q. And the following minutes of the organiza-

(Deposition of Lloyd R. Arnold.)

tion meeting, which was held on February 21st, 1938—look at those and state who were elected officers and members of the executive committee.

A. Well, the officers were M. Maffei, president; myself, first vice-president and secretary; Peter Bercut, second vice-president; A. A. Heer, Jr., treasurer; and J. M. DeVleig, who was assistant treasurer; and L. Garwood, assistant secretary.

Q. Who were elected members of the executive committee? A. That is the same committee.

Q. The same committee as before—is that right?

A. Yes.

Q. I will now ask you to take a look at the minutes of the executive committee for the meeting held February 25th, 1938, and ask you whether or not you recognize the signature of Peter Bercut as one of the members present approving the minutes?

A. I recognize them all, yes.

Q. I will now ask you to take a look at the minutes of the special meeting of the executive committee held March 21st, 1938, at which meeting it appears that Maffei, Arnold and Peter Bercut were present, and I ask you to look at page 38 thereof and state whether or not Mr. Peter Bercut approved in writing the said minutes?

A. That is correct.

Q. I will now ask you to take a look at the special meeting, the minutes of the special meeting of the board of directors held November 12th, 1938, and state whether or not you recall the transaction

(Deposition of Lloyd R. Arnold.)

therein referred to, and state whether or not Peter Bercut was present at that meeting?

A. Well, in the first instance he was listed as present.

Q. Was anybody listed as absent?

A. T. M. Ryerson. Yes, I recall now.

Q. Was the transaction therein referred to thereafter consummated?

A. There are two or three different ones. I believe they all were, yes.

Q. I now want you to take a look at the minutes which appear on pages 55 to 60 inclusive of Volume V, dealing with the minutes of the annual meeting of the stockholders held Wednesday, February 15th, 1939, and state who were elected directors at that meeting?

A. Maffei, Heer, Arnold, Giachino, Richards, Bercut, and Ryerson. The same ones as previously were.

Q. And the minutes of the special meeting of the newly elected Board held February 15th, 1939, state who were elected officers and members of the executive committee.

A. M. Maffei, president; L. R. Arnold, first vice-president and secretary; Peter Bercut, second vice-president; A. A. Heer, Jr., treasurer. That is the same committee again.

A. I now ask you to take a look at the minutes of the executive committee meeting held June 26th,

(Deposition of Lloyd R. Arnold.)

1939, and state whether or not at that meeting you recall Mr. Peter Bercut being present?

A. Yes, I do. He is listed. He must have been.

Q. Do you recall the financial report sent out to the stockholders or approved at said meeting for the purpose of being sent out to the stockholders, dealing with the financial condition of the company as of December 31st, 1938?

A. Yes, that is our printed report.

Q. And who prepared this report, this financial report of Pacific Empire Holdings?

A. I believe I prepared the report, and Mr. Heer prepared the balance sheet.

Q. Did the executive committee approve this report and authorize it to be sent out to the stockholders?

Mr. Goodman: Just a minute. Is that in the minutes?

Mr. Scampini: That is in the minutes.

Mr. Goodman: All right. It speaks for itself.

Mr. Scampini: All right.

Q. Now, I notice in this report dated December 31st, 1938, that the common stock of the Merchants Ice & Cold Storage Company is given a valuation of \$522,638.25, and the preferred stock of the Merchants Ice & Cold Storage Company is given a valuation of \$118,265.66. Mr. Arnold, how did you arrive at those figures?

A. Well, the first one is par—preferred stock, I mean. That is par; it must have been—well, as it

(Deposition of Lloyd R. Arnold.)

states, that is a book value based on the Haskins & Sells report.

Q. Is that the book value of the stock?

A. Well, I will read it to you:

“Valuation based upon the value stated by the audited balance sheet of Merchants Ice & Cold Storage Company, as of December 31st, 1938, as prepared and certified to by Messrs. Haskins & Sells, certified public accountants.”

Q. In other words, you took the valuations placed on these shares by the auditors' report of the Merchants Ice & Cold Storage Company as of December 31st, 1938, and transferred those values as the current value for these shares on the books of the Pacific Empire Holdings? Is that right?

A. That is right. That was according to our practice.

Q. I will ask you now to look at the minutes which appear on pages 79 to 83 inclusive of Volume V, dealing with the annual stockholders' meeting held at Wilmington, Delaware, on February 15th, 1940, and state who were elected directors for the ensuing year?

A. That same Board as the previous year, yes.

Q. And the minutes of the special meeting of the newly elected Board on February 15th, 1940—state who were elected officers and members of the executive committee?

A. The same officers as the previous year. No change.

(Deposition of Lloyd R. Arnold.)

Q. The same members of the executive committee? A. The same members, yes.

Q. I will now ask you whether since February 15th, 1940, there have ever been held any other stockholders' meetings? A. 1940?

Q. Yes.

A. Wait a minute. This is '42—let me see—we couldn't get a quorum in '41—no.

Q. And was the 1941 meeting adjourned from time to time for the purpose of obtaining a quorum?

A. Yes.

Q. And has a quorum ever been obtained since the last meeting on February 15th, 1940?

A. No, it has not.

Q. I will now ask you whether or not on or about January 8th, 1941, a transaction took place wherein and whereby Peter Bercut purported to purchase from Pacific Empire Holdings certain shares of Merchants Ice & Cold Storage Company. Do you recall any such transaction or occurrence?

A. I do.

Q. Now, at that time—— Strike that out, please. Take a look at the document which I now hand you, and which purports to be a copy of a certain agreement. (Handing document to the witness.)

A. Yes, I recognize it.

Q. What is that document which you have in your hand?

A. Well, it is a letter addressed by the company.

Q. What company?

(Deposition of Lloyd R. Arnold.)

A. By the Pacific Empire Holdings to Mr. Bercut.

Q. Under what date?

A. Under date of January 8th, 1941.

Q. Now, at that time was Mr. Peter Bercut an officer or director or member of the executive committee of the Pacific Empire Holdings?

A. Yes, I believe he was.

Q. And state whether or not the original of that letter was sent by the company, or was sent to Mr. Peter Bercut.

A. It was either sent or given to him.

Q. Given to him. Who signed it?

Mr. Goodman: No, he didn't say that. He said it was sent or given.

Mr. Scampini: Yes, sent or given.

A. Pardon?

Mr. Goodman: I just wanted to see that the reporter got it correctly.

Mr. Scampini: Q. Now, who signed for the holding company?

A. M. Maffei signed as president, and I signed as secretary.

Q. And do you have any executed copy of that so-called letter in your file, signed by either of the officers that you have mentioned, or by Peter Bercut?

A. There must be one in the file somewhere.

Q. Do you recognize that copy?

A. Yes, I recognize the copy—yes, sir.

(Deposition of Lloyd R. Arnold.)

Q. Is that a true copy of the letter?

A. I dictated it myself.

Q. Is that a true copy of the letter which you say was either mailed or delivered to Mr. Peter Bercut?

A. Yes, it is the copy.

Q. Now, at the time that the letter bears date was Mr. Peter Bercut a director of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. At that time did the Pacific Empire Holdings own the controlling interest of the Merchants Ice & Cold Storage Company? And by that I mean did it own enough shares to control the election of its board of directors?

A. Yes, it did.

Q. Did it own more than 50% of the voting power of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. Who caused Mr. Peter Bercut to be elected to the board of directors of the Merchants Ice & Cold Storage Company?

Mr. Goodman: I think that question is objectionable on the ground it calls for the opinion and conclusion of the witness.

Mr. Scampini: Q. Well, you answer it, and then the Court will rule on it. Who caused the election of Mr. Peter Bercut to the board of directors of the Merchants Ice & Cold Storage Company?

A. I believe we did—the holding company.

Q. The holding company. Now, at that time—that is, on or about January 8th, 1941—did the holding company own a substantial block of stock of

(Deposition of Lloyd R. Arnold.)

Pacific National Bank of San Francisco—or Pacific Empire Corporation, its subsidiary?

A. Well, through its subsidiary, the Pacific Empire Corporation, it did, yes.

Q. At that time was Mr. Peter Bercut an officer or director of the Pacific Empire Corp., on January 8th, 1941?

Mr. Goodman: I will object to that unless it can be shown that the witness knows of his own knowledge.

Mr. Scampini: Q. That is, of your own knowledge.

Mr. Goodman: As officer or director.

A. I believe he was.

Mr. Scampini: Q. Were you an officer or director of the Pacific Empire Corp. on January 8th, 1941?

A. Yes, I was, yes.

Q. Do you recall whether or not—do you know whether or not at that time Mr. Peter Bercut was an officer or director of that company?

A. He was a director. I am not certain on the other part of it. I will have to look it up.

Q. Was Mr. Maffei at that time the president of the Pacific Empire Corp.?

A. Yes, he was.

Q. Now, was Mr. Peter Bercut, if you know of your own knowledge, on January 8th, 1941, a director of Pacific National Bank of San Francisco?

A. Yes, he was.

Q. Do you know how Mr. Peter Bercut became

(Deposition of Lloyd R. Arnold.)

Q. Is that a true copy of the letter?

A. I dictated it myself.

Q. Is that a true copy of the letter which you say was either mailed or delivered to Mr. Peter Bercut?

A. Yes, it is the copy.

Q. Now, at the time that the letter bears date was Mr. Peter Bercut a director of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. At that time did the Pacific Empire Holdings own the controlling interest of the Merchants Ice & Cold Storage Company? And by that I mean did it own enough shares to control the election of its board of directors?

A. Yes, it did.

Q. Did it own more than 50% of the voting power of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. Who caused Mr. Peter Bercut to be elected to the board of directors of the Merchants Ice & Cold Storage Company?

Mr. Goodman: I think that question is objectionable on the ground it calls for the opinion and conclusion of the witness.

Mr. Scampini: Q. Well, you answer it, and then the Court will rule on it. Who caused the election of Mr. Peter Bercut to the board of directors of the Merchants Ice & Cold Storage Company?

A. I believe we did—the holding company.

Q. The holding company. Now, at that time—that is, on or about January 8th, 1941—did the holding company own a substantial block of stock of

(Deposition of Lloyd R. Arnold.)

Pacific National Bank of San Francisco—or Pacific Empire Corporation, its subsidiary?

A. Well, through its subsidiary, the Pacific Empire Corporation, it did, yes.

Q. At that time was Mr. Peter Bercut an officer or director of the Pacific Empire Corp., on January 8th, 1941?

Mr. Goodman: I will object to that unless it can be shown that the witness knows of his own knowledge.

Mr. Scampini: Q. That is, of your own knowledge.

Mr. Goodman: As officer or director.

A. I believe he was.

Mr. Scampini: Q. Were you an officer or director of the Pacific Empire Corp. on January 8th, 1941?

A. Yes, I was, yes.

Q. Do you recall whether or not—do you know whether or not at that time Mr. Peter Bercut was an officer or director of that company?

A. He was a director. I am not certain on the other part of it. I will have to look it up.

Q. Was Mr. Maffei at that time the president of the Pacific Empire Corp.?

A. Yes, he was.

Q. Now, was Mr. Peter Bercut, if you know of your own knowledge, on January 8th, 1941, a director of Pacific National Bank of San Francisco?

A. Yes, he was.

Q. Do you know how Mr. Peter Bercut became

(Deposition of Lloyd R. Arnold.)

elected to the board of directors of the Pacific National Bank of San Francisco, and when?

Mr. Goodman: Well, I will object to that as calling for the opinion and conclusion of the witness, and the proper foundation hasn't been laid.

Mr. Scampini: Q. Will you answer the question? A. Did you say to answer it?

Q. Yes. The objection is reserved.

A. I guess you will have to ask me that again.

Q. Do you know when Mr. Peter Bercut was elected to the board of directors of Pacific National Bank of San Francisco—approximately when?

Mr. Goodman: The same objection.

A. I believe it was sometime—at the annual meeting in '40, but—yes, 1940, I believe.

Mr. Scampini: Q. Who caused his election to the board of directors of the Pacific National Bank of San Francisco to be made?

Mr. Goodman: The same objection.

Mr. Scampini: Q. If you know?

A. The corporation did, I assume.

Q. What corporation?

A. The Pacific Empire Corporation.

Q. Did you as an officer of the Pacific Empire Corporation or Pacific Empire Holdings cause the shares of stock owned by the Pacific National—by the two companies in the Pacific National Bank of San Francisco to be voted in favor of the election of Peter Bercut to the board of directors of the Pacific National Bank of San Francisco?

A. We did, yes. It was our policy.

(Deposition of Lloyd R. Arnold.)

Q. Now, did you during all this period of years concerning which you have testified now—did you at all times discuss the affairs and activities of Pacific Empire Holdings with Mr. Peter Bercut?

A. Yes.

Q. Did you keep him advised as to the condition, financial or otherwise, of the corporation during that period of time?

A. Well, it is very evident there that we did, yes.

Mr. Goodman: Well——

Mr. Scampini: Q. Well, answer “Yes” or “No,” if you know. A. Yes, we did.

Q. Did you request Mr. Peter Bercut to become a director of the Merchants Ice & Cold Storage Company? A. I believe we asked him to, yes.

Q. Did you advise him of the condition of the Merchants Ice & Cold Storage Company when he became a director? Was he kept aware of its condition, to your knowledge?

A. Well, I believe he must have known the condition of the Merchants, yes.

Q. Don't say you believe. Just say whether you know or not. Do you know whether or not you advised and kept Mr. Bercut informed as to the condition of the Merchants Ice & Cold Storage Company?

A. Well, yes, he was advised of their condition.

Q. Now, in or about December, of 1940, were you the president of Merchants Ice & Cold Storage Company? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. Was Mr. Maffei an officer of the Merchants Ice & Cold Storage Company? A. Yes.

Q. What was he?

A. He was a vice-president and director.

Q. Was Mr. Peter Bercut an officer of the Merchants Ice & Cold Storage Company?

A. I believe he was only a director.

Q. Do you know whether or not he was a second vice-president?

(No answer.)

Q. If you don't know, just say you don't know.

A. I would have to look it up. I don't know.

Q. All right. Now, on or about that time did the Pacific Empire Holdings owe some money to Merchants Ice & Cold Storage Company?

A. Yes, we did.

Q. Now, from 1933 to the end of 1940, is it true or is it not true that Pacific Empire Holdings and Pacific Empire Corporation from time to time loaned various sums of money to Merchants Ice & Cold Storage Company for use by it as working capital, and for its business?

A. We most certainly did.

Q. And on several occasions is it not true that Pacific Empire Corporation and Pacific Empire Holdings advanced money to Merchants Ice & Cold Storage Company for the purpose of enabling the latter to meet its bonded indebtedness as it came due? A. On several occasions.

Q. Now, from the converse end of it, did from

(Deposition of Lloyd R. Arnold.)

time to time Merchants Ice & Cold Storage Company lend money to Pacific Empire Holdings or Pacific Empire Corporation?

A. Yes, it did.

Q. There was, in other words, a series of transactions back and forth between the holding company and its subsidiaries? Is that right?

A. That is right.

Q. And the Merchants Ice & Cold Storage Company at that time was a subsidiary of Pacific Empire Holdings, wasn't it? A. Yes.

Mr. Goodman: That calls for his opinion and conclusion.

Mr. Scampini: All right.

Q. At that time they held a controlling interest in it?

A. We held a majority—the controlling stock, anyway.

Q. All right. Now, on or about December 31st, 1940, did the holding company have urgent need of cash for some reason?

A. Yes, very much so.

Q. And at that time what did the holding company own by way of assets?

A. We still owned the controlling interest in the Merchants, the controlling interest in the Pacific Empire Corporation, and still had our interest in the laundry at Bakersfield. That is about all of any importance, I guess.

Q. Now, did the assets—strike that out, please.

(Deposition of Lloyd R. Arnold.)

Did the ownership of the holding company in Merchants Ice & Cold Storage Company on December 31st, 1940, if you know, exceed by more than 50% the aggregate value of all of its assets?

Mr. Goodman: Well, I will object to that on the ground the proper foundation hasn't been laid.

Mr. Scampini: Q. What values were placed on Merchants Ice & Cold Storage Company on the books of the holding company as of December 31st, 1940, Mr. Arnold?

A. I believe that is the same statement I was looking at. (Indicating in the minutes.) Well, I would say it was near—the book value shown was near a half million dollars, or a little under.

Q. All right. What values were placed on the holdings of the holding company in Pacific Empire Corp.?

A. Let me see the balance sheet here. (Referring to minute book.)

Q. What are you reading from?

A. There must be a later one. This is 1938.

Q. Was there any subsequent audit to 1938?

A. There should be another balance sheet, I would think. This is 1938. Well, there isn't very much here.

Q. Were there any substantial, material changes between 1938 and 1940, that you know of?

Mr. Goodman: Well, of course, the record is the best evidence of that.

(Deposition of Lloyd R. Arnold.)

A. The bank account is about the same. This happened to be a consolidated statement.

Mr. Scampini: All right. We will let that go. We will have some trouble on the trial. I want you to identify the ledger books while you are here. We will prove it by the ledger books.

Q. Then what happened on or about January of 1941 with regard to the stock of the Merchants Ice & Cold Storage Company?

A. Well, at that time we were negotiating for its sale.

Q. What do you mean by negotiating for its sale—"we"?

A. When I say "we", I mean the Pacific Empire Holdings.

Q. Well, did you ever obtain any consent from them to negotiate its sale?

Mr. Goodman: I will object to that as calling for the opinion and conclusion of the witness.

Mr. Scampini: I will instruct him to answer, and then we will let the Court decide it.

A. I don't believe I did in any formal way, no.

Q. Well, did you ever authorize—did the Board of Directors have a meeting as a Board, or did you ever call a meeting of the Board to authorize you—

A. No, I didn't.

Q. Did you ever call a meeting of the executive committee of the Board to authorize the sale of the Merchants Ice & Cold Storage stock?

A. No.

Q. Did you ever ask the stockholders of the

(Deposition of Lloyd R. Arnold.)

company to authorize the sale by the company of the stock? A. No.

Q. And what do you mean by "we", when you said "we negotiated its sale"?

A. I mean that we—that Mr. Maffei and myself on behalf of the holding company were endeavoring to work out a plan where—well, that would help and more or less save both companies, you might say.

Q. Well, now, what did you do pursuant to that intention?

A. Well, we opened the subject up for discussion with one or two places.

Q. Where did you open it up?

A. We discussed it at length with Mr Gaither over at the Pacific National, and of course discussed it with Mr. Bercut; in other words, the financial——

Q. When did you first start to discuss it with Mr. Bercut?

A. It must have covered a period of thirty or sixty days, I guess.

Q. Who conducted the negotiations with Mr. Bercut?

A. Most of them were conducted by myself.

Q. What were you at that time in the company?

A. Vice-president and secretary.

Q. What was Mr. Bercut at that time?

A. Vice-president.

(Deposition of Lloyd R. Arnold.)

Q. Did Mr. Maffei sit in during any of the negotiations?

A. Mr. Maffei was there on occasions. He was fully informed.

Q. Was anybody else kept fully informed on the Board of Directors, of these negotiations?

A. Well, Mr. Heer was a director; he was in my next office, yes.

Q. Well, what did you say to Mr. Heer?

A. He was informed of the negotiations.

Q. Well, what did you say to him?

A. I presume I kept him up to date on the details of the negotiations.

Q. Did you ever ask him for his opinion?

A. We all exchanged opinions, yes.

Q. Did he express any opinions?

A. I don't recall whether he expressed any or not. We were all of the opinion that the transaction along the lines we were endeavoring to work out had to be made.

Q. What do you mean—"had to be made"?

A. Because the financial condition of Merchants and the holding company made it necessary.

Q. Well, what was the financial condition of the holding company which made it necessary that you have this transaction?

A. Well, our loans had been criticized over at the Pacific National.

Q. What loans?

A. The loans of the holding company.

(Deposition of Lloyd R. Arnold.)

Q. Yes.

A. We had a big government suit against us on the revenue stamp tax, and there were other obligations pressing.

Q. And was the financial condition of the Merchants involved, too, at that time?

A. Yes, the financial condition of the Merchants was very much involved at that time.

Q. Well, now, what did you say to Mr. Peter Bercut when you first opened the subject to him?

A. Well, I don't know as I can give my exact words.

Q. Well, give the best recollection that you have.

A. Well, we approached Mr. Bercut, or I did—either Mr. Maffei or myself. I believe I did.

Q. What did you approach him for?

A. For the purpose of—well, at that time we were endeavoring to work out some sort of an association with some one who had certainly more credit than we had.

Q. What do you mean—“we had”?

A. The Pacific Empire Holdings and the Merchants Ice & Cold Storage Company, both of them. We were at about the end of our situation so far as credit was concerned and so far as obtaining sufficient cash to meet our commitments, and we were endeavoring to associate ourselves with some partnership arrangement.

Q. With whom?

A. In this instance with Mr. Bercut.

Q. What do you mean by “partnership arrangement”?

(Deposition of Lloyd R. Arnold.)

A. Well, the Merchants was badly in need of financial assistance, and we were at the end of our rope and we couldn't supply any.

Q. You mean you couldn't supply any more capital to the Merchants?

A. No more—no more capital; either the holding company or——

Q. By that you mean the holding company?

A. The holding company. The corporation had done that in previous years, but we were not able to do that any more.

Q. Yes. So what did you suggest to Mr. Peter Bercut?

A. Well, I believe our conversation started out with the idea of selling part of our holdings in the Merchants.

Q. To whom? A. To Mr. Bercut.

Q. And what did he say to you?

A. Well, then we entered into our discussions and negotiations, and gave him——

Q. What did he say?

A. (Continuing) ——and gave him financial statements, and things of that character. I believe—I believe during the negotiations one of his men looked over the situation.

Q. Which situation?

A. The condition of Merchants; and in fact I believe I talked to him myself in my office uptown and gave him statements and information.

Q. Now, what did you say first? When you first

(Deposition of Lloyd R. Arnold.)

opened it up to him, what did you propose to him?

A. Just as I said before.

Q. Well, you haven't said much. What did you propose to him?

A. Well, I proposed to him—I believe our first conversations were——

Q. I will get the facts, you know, sooner or later, so let's get all the facts.

A. All right. I am trying to give them to you. I am not hiding anything. All right, now, I will start over. I contacted Mr. Bercut and discussed the entire situation in a general way.

Q. Well, I still don't know what you mean by "the entire situation." Which situation and whose situation?

A. I reviewed at the same time the condition of Merchants, the condition of the holding company, and the situations making it necessary that we, the holding company, enter into some sort of a negotiation where we could receive financial help.

Q. All right. What did he say to you?

A. Well, he wanted to know the story, so we—there was naturally more than one conversation; there were several. We mostly went into the affairs of Merchants at that time. I told him about the amount of money that was owing by the holding company, and certain losses that were just coming to a head in connection with the Merchants accounts. I believe Mr. Bercut knew of the difficulties we were having with the bondholders. That covered about all.

(Deposition of Lloyd R. Arnold.)

Q. Now, just a moment. The bonds had been paid right along in the Merchants, had they not?

A. Yes, but we were in a technical violation.

Q. You were in a technical violation with the Merchants?

A. The Merchants, yes.

Q. I see. Now, Mr. Peter Bercut was at that time a director of Merchants, was he not?

A. Yes, sure.

Q. All right. Go ahead.

A. In other words, we were having some serious differences and difficulties in the Board meetings, and we were exchanging letters with the trustee for the Merchants bond issue. Other conditions bringing this about were—when we had consolidated—when the Merchants had consolidated its loans from the Anglo—we had previously changed our banking from the Anglo and the Bank of America under pressure to the Pacific National Bank, where we thought we would have ample credit. However, owing to the fact that the holding company also was obligated to the Pacific National the banking department later ruled that both loans were interlocking, and consequently that cut the line of credit of the Merchants just about in half. In fact, our situation so far as credit was concerned was so serious that we had to go out to finance companies and finance some of our paper.

Q. All right. What did you propose to Mr. Bercut?

A. The original discussions were along the lines

(Deposition of Lloyd R. Arnold.)

of the holding company selling part of its stock—probably a majority of its holdings.

Q. To whom? A. To Mr. Bercut.

Q. For what price?

A. Well, we were mainly talking about lump sums, I believe. I think we started out with \$50,000.00, or something like that.

Q. For how many shares?

A. Well, I believe we owned at that time about—what was it? 69,000?

Q. 78,000, wasn't it? (Indicating document.)

A. 78,000—oh, wait a minute. I beg your pardon, just a second. (Examining document.) Yes, 78,000 shares. That is both common and preferred.

Q. Well, how many shares did you propose to sell to Mr. Bercut?

A. Well, we proposed to sell a majority of our holdings; in other words, that we would have to step into a minority position.

Q. For what price?

A. Our first conversation was around \$50,000.00. We ended up——

Q. Never mind. Now, I am asking you the question, what did he say to you after you proposed it to him?

A. Well, he expressed interest. He was somewhat skeptical because of our condition first, but he——

Q. Whose condition? A. Merchants.

Q. Well, then, what did he say to you?

(Deposition of Lloyd R. Arnold.)

A. Well, I don't exactly know, but he said he wanted to look into it.

Q. All right. Did he look into it?

A. Yes, he did.

Q. Then what happened next?

A. Well, there was a lapse in our negotiations, probably twenty or thirty days.

Q. Then what happened?

A. During which time our condition did not improve.

Q. Then what happened?

A. Then we resumed our negotiations again.

Q. All right. A. And——

Q. What did you say to him and what did he say to you?

A. Well, he expressed the fact—while we were negotiating, why, he naturally had found out about certain losses that were there, and we also had another loss that was somewhat publicized in the papers, or a threatened loss, and he became somewhat hesitant upon working out the deal.

Q. What did he say to you?

A. However—well, on one occasion I have to admit he said that he didn't know whether he wanted to go through with it or not.

Q. All right. Then what happened?

A. There was another little lapse, and then we resumed again, and we were able to come to an understanding.

Q. What was that understanding?

(Deposition of Lloyd R. Arnold.)

A. It resulted in the deal that was made.

Q. What was that understanding?

A. The understanding was—the final understanding was that the best he would pay was \$35,000.00.

Q. For what? A. For all of our stock.

Q. Payable how? Payable how?

A. Payable in cash to the holding company, and we in turn to apply twenty-five thousand on our obligation to the Merchants.

Q. All right.

A. I think we were given an option, too.

Q. Now, when that understanding was reached, who reached the understanding? Whose minds met on that understanding?

A. Mr. Bercut and myself.

Q. Then what did you do?

A. Then we went to the Pacific National Bank.

Q. Now, wait a minute. Did you draft some form of agreement on it?

A. I drafted—this is my own dictation; I drafted this agreement here (indicating)—the original of this. This is a copy.

Q. What did you do? Dictate it to your secretary?

Mr. Goodman: Excuse me just a moment. But has that letter been identified?

Mr. Scampini: I am going to.

Mr. Goodman: I think you had better identify it.

(Deposition of Lloyd R. Arnold.)

A. I drafted this document.

Mr. Scampini: All right. Will you mark this as the next exhibit for purposes of identification?

(Said letter marked "Plaintiffs' Exhibit 3 for identification.")

Mr. Goodman: Leave this off the record.

(Discussion.)

Mr. Goodman: It has no signatures on it.

Mr. Scampini: All right. The original is supposed to be in the hands of Mr. Peter Bercut. I will have to find out——

A. I drafted this; I am sure I did.

Q. Then what happened when you drafted that? What did you do?

A. Delivered the original to Mr. Bercut.

Q. Did you sign it?

A. Yes, Mr. Maffei signed it.

Q. Did you ask Mr. Maffei to sign it?

A. He signed it.

Q. Did you call any meeting of the Board of Directors to approve the transaction? A. No.

Q. Did you ever suggest or did Mr. Bercut ever suggest a meeting of the Board of Directors to pass upon the transaction?

A. I don't believe so. I don't recall.

Q. Did you ever call any meeting of the executive committee to pass upon the transaction?

A. No, I didn't call a formal meeting.

Q. Who were the executive committee at that time?

A. The executive committee was Mr. Maffei,

(Deposition of Lloyd R. Arnold.)

Mr. Bercut, and myself.

Q. And after this letter agreement was drafted by you and signed by you, what did you do with it? What did you do with it?

A. I delivered the original to Mr. Bercut.

Q. Did Mr. Bercut sign underneath where it says "Accepted"? A. Yes, I believe he did.

Q. And did he take possession of the stock at that time?

A. We went to the Pacific National Bank—I believe we went down there together, and by paying the bank what we owed them—not what we owed them; I mean delinquent trust charges and interest, and they wanted a \$5,000.00 payment on the principal to release the stock. That was the main block, of course, of the Pacific National.

Q. Wasn't that stock that was referred to in that agreement on pledge at the time to Pacific Empire Corporation? A. Yes, most of it was.

Q. Did Pacific Empire Corporation receive anything from the transaction?

A. Well, they were to receive the cash, but it was immediately re-loaned to the holding company, of course.

Q. Did the Pacific Empire Corporation make this deal, or did Pacific Empire Holdings make the deal?

A. No, Pacific Empire Holdings made the deal.

Q. And what consideration did the Pacific Empire Corporation receive out of the transaction?

(Deposition of Lloyd R. Arnold.)

A. Well, the procedure was that we—I mean the bookkeeping end of it——

Q. Tell me what you did with the consideration.

A. Wait a minute. You have got me confused here now.

Q. Well, I don't want you to be confused. I don't want to confuse you.

A. I don't mean it that way. This was sold by the Pacific Empire Holdings Company. It owned the stock, naturally; it was pledged. The holding company got the cash.

Q. Yes. What did you do with the cash.

A. Put twenty-five thousand in a special account for the Merchants.

Q. Whose money was that that you paid to the Merchants? Who paid the money to the Merchants?

A. The holding company, I believe.

Q. How much did you pay to the Merchants?

A. Twenty-five thousand.

Q. You had \$10,000.00 left. What did you do with that \$10,000.00? What did the holding company do with the \$10,000.00?

A. Well, five thousand went for principal.

Q. On what?

A. On the bank loan with the Pacific.

Q. Whose loan?

A. I believe the holding company loans—there were two loans there at the time; and that is why I am hesitating.

Q. And the balance went for what?

(Deposition of Lloyd R. Arnold.)

A. The balance went for delinquent interest and trust charges. I think the whole thing amounted to about \$8,000.00 or more at the time we got through.

Q. Didn't you pay some of this to Kohler & Chase for rent, from the \$10,000.00?

A. Yes, they got some of it.

Q. Whose obligation was that?

A. Holdings'.

Q. Now, I want to know what did Pacific Empire Corporation receive from the proceeds of this transaction?

A. Well, they didn't receive anything, I guess.

Q. Now, at that time you were director of Pacific Empire Corporation, weren't you?

A. Yes.

Q. Mr. Maffei was president, wasn't he?

A. Yes.

Q. Mr. Bercut was a director, wasn't he?

A. Yes.

Q. You all knew—that is, you knew about this pledge of the Merchants Ice stock to Pacific Empire Corporation, didn't you? A. Yes.

Q. All right. Did you call any meeting of the Board of Directors of Pacific Empire Corp. and release the pledge of Pacific Empire Corp. on this stock?

A. No, I didn't. I wasn't secretary of that company, you know.

Q. Well, do you know whether or not any such meeting was held?

(Deposition of Lloyd R. Arnold.)

A. Not within my knowledge.

Q. No, did you ever participate in any such meeting? A. No.

Q. Do you know whether or not a release of the pledge was ever obtained from Pacific Empire Corporation for this transaction?

A. Not that I know of.

Q. No. Now, subsequent to the transaction, to the signing of this agreement, did you deliver the shares to Mr. Peter Bercut referred to therein?

A. Yes.

Q. And how many shares were delivered to Mr. Peter Bercut?

A. Well, everything I believe that is in that letter.

Q. Read it.

A. The total holdings were 78,358 shares. That is correct.

Q. Were those all of the shares owned by the holding company of Merchants Ice & Cold Storage Company? A. That figure there is all, yes.

Q. And after that stock was delivered to Mr. Bercut, what did the holding company own thereafter by way of assets?

A. Well, we still had our stock in the Pacific Empire Corporation.

Q. Well, where was that stock?

A. That was in our—it was in our safe at that time.

Q. All right. And what did Pacific Empire Cor-

(Deposition of Lloyd R. Arnold.)

poration own at the time? What were the assets of Pacific Empire Corporation?

A. The assets were stock of Pacific National Bank and the obligation of the holding company.

Q. And how much did the holding company owe the Pacific Empire Corporation approximately?

A. I believe around a hundred and fifty thousand—somewhere around there.

Q. And did you have anything else in the holding company besides this stock of the Pacific Empire Corporation?

A. We had our interest in the laundry.

Q. And how much was that?

A. Well, $47\frac{1}{2}\%$ interest at that time.

Q. What had you done with that $47\frac{1}{2}\%$ interest?

A. Well, it wasn't in our safe; it was pledged.

Q. Pledged to whom?

A. Kern County Bank at Bakersfield.

Q. Did you have any other assets that you know of? A. Yes, we had odds and ends.

Q. Worth approximately how much?

A. Well, not very much.

Q. How much were the aggregate liabilities of the holding company after this transaction was consummated?

A. Well, whatever was still owing to the Merchants; I guess another twenty or twenty-five thousand. We owed our landlord, George Chase, at that time probably eleven thousand or so.

(Deposition of Lloyd R. Arnold.)

Q. Who else?

A. Oh—yes, we owed our attorneys that were handling the litigation with the Government.

Q. Who were they?

A. Howard Ellis and Conrad Hubner.

Q. How much?

A. I believe they had—I guess they had just about earned their fee up there—somewhere around twelve or thirteen thousand.

Q. Who else did the holding company owe?

A. Well, at that time we owed another attorney down here, Eddie Molkenbuhr. In fact, we owe some to Mr. Scampini too?

Q. Did you owe the Corporation Trust Company?

A. Yes, we owed the Corporation Trust Company.

Q. Approximately how much?

A. Oh, we must have owed them probably a couple of thousand dollars.

Q. Did you owe to the liquidating agent of the City National Bank approximately \$70,000.00?

A. Yes, with principal and interest, yes, it must be around that.

Q. Did you owe Pacific Empire Corp. approximately \$150,000? A. Yes.

Q. Well, now, after this transaction was consummated what did the holding company have with which it could discharge these obligations?

A. It only had its stock in the Empire Corpo-

(Deposition of Lloyd R. Arnold.)

ration and its 47½% interest in the laundry company at Bakersfield.

Q. That had already been pledged? Is that right? A. That is right.

Q. Now, subsequent to this transaction did Mr. Peter Bercut—strike that out. Subsequent to the transaction, did the change in the management of the Merchants Ice & Cold Storage Company take place, to your knowledge?

A. You said subsequent to this transaction?

Q. Yes. A. Yes, it did.

Q. What happened?

A. Well, I believe that the new management represented by the purchasers—by the purchaser—I believe they took possession sometime—I believe it was February 1st, the following month.

Q. Did you resign as an officer and director of the Merchants Ice & Cold Storage Company?

A. Yes, we called a meeting, or else it may have been the next regular meeting, and I resigned, yes.

Q. And did Mr. Maffei resign as an officer or director? A. Yes.

Q. Did Mr. Peter Bercut and his nominees take over the management of Merchants Ice & Cold Storage Company? A. Yes, they did.

Q. Now, at the time on or about January 1st, 1941, was the Merchants Ice & Cold Storage Company making money from its operations or losing money?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: Are you referring to January 1st, 1941 or 1942?

Mr. Scampini: 1941.

A. It was losing money.

Q. It was losing money from its operations?

A. Yes.

Q. Are you sure it was losing money from its operations? A. Yes—wait a minute, now.

Q. That is just what I want—I want you to be sure.

A. Well, I mean they lost money from it—let's see, now——

Q. Did it show at the end of the year any net profits, or what? A. Well——

Q. Well, never mind. We will prove it. Withdraw the question. A. I could answer that.

Q. We will prove it from the books of the company. I now want to show you, Mr. Arnold, a letter addressed to Pacific Empire Holdings, Inc., and I will ask you to look at that document and see if you recognize it? (Showing letter to the witness.)

A. Yes, I recognize it.

Q. Whose signature is that at the bottom?

A. Mr. Bercut.

Q. When did you receive that document from Mr. Peter Bercut?

A. I don't know—I would say on or about the time of the conclusion of the negotiations.

Q. Which negotiations?

A. Having to do with the sale.

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: Mark this as plaintiffs' exhibit next in order.

(Said letter marked "Plaintiffs' Exhibit 4 for identification.")

Q. Do you recall the conversation with Mr. Bercut with respect to this document which is now Exhibit 4, purporting to be a letter of resignation signed by Peter Bercut, addressed to Pacific Empire Holdings, Inc., under date of March 31, 1940?

A. I don't know as I recall the conversations.

Q. Just substantially, give us the best of your recollection.

A. Well, I believe it was just merely brought up for discussion, whether or not he should resign as director.

Q. And who brought it up?

A. I presume Mr. Bercut did.

Q. Well, do you recall whether he did or did not?

A. He would have brought it up, probably.

Q. Well, do you recall whether he did or did not bring it up? Do you recall?

A. He brought it up.

Q. And do you recall where this document was dictated by Mr. Peter Bercut, or at what time? Was it handed to you, or what?

A. That was dictated up in our office there, yes.

Q. Do you recall approximately when it was dictated in your office by Mr. Peter Bercut?

A. Well, as I said, on or about the time when we were concluding the negotiations, yes.

(Deposition of Lloyd R. Arnold.)

Q. When was this resignation of Mr. Peter Bercut accepted by the Board of Directors, if you know, Mr. Arnold?

A. It has never been accepted, that I know of, by a formal Board meeting, no.

Q. Now, did you hold a meeting in just the last couple of weeks? A. No—well——

Q. I will ask you to take a look at the minutes.

A. (Examining minute book.) This is this last one—no—no, there was no action taken on that.

Q. Well, will you please read the minutes and see whether or not—just a second. State what you did with that resignation at that meeting?

A. The resignation wasn't brought up here, no.

Mr. Goodman: What is the date of those minutes?

A. This is August 20th, 1942.

Mr. Scampini: Q. You say it wasn't brought up, Mr. Arnold. Will you read the minutes and see if they refresh your memory.

A. Yes, that is right. It was brought up at this meeting. I had forgotten about it.

Q. All right. Now, did you ever hold any directors' meeting in between the period of time intervening from on or about January 8th, 1941, and the meeting held August 20th, 1942?

A. No, I don't believe there was a Board meeting.

Q. Was there ever any executive committee meeting?

(Deposition of Lloyd R. Arnold.)

A. I will have to look and see here (examining minutes). Your question was what?

Q. Since January 8th, 1941, up to August 20th, or thereabouts, of 1942, were there ever any intervening meetings? A. '41 and '42—no.

Q. So that the first meeting of the Board since January 8th, 1941, was the one held August 20th, 1942? Is that right?

A. Yes, this last meeting, yes.

Q. All right. Now, was there any stockholders' meeting held in 1942?

A. No, that is the meeting. We couldn't get a quorum again.

Q. Now, at the meeting held August 20th, 1942, did you submit to the Board for its confirmation, approval or disapproval the transaction wherein and whereby Peter Bercut acquired this block of Merchants Ice & Cold Storage Company stock?

A. Let me refresh my mind from these minutes here. There are two or three there—may I look at that again?

Mr. Goodman: Just a second (examining minute book).

A. What date was that again?

Mr. Scampini: Q. This last meeting.

A. The first meeting?

Q. That was the first meeting held, you testified—— A. Yes.

Q. (Continuing:)—since the transaction with Mr. Peter Bercut? A. Yes, sir.

(Deposition of Lloyd R. Arnold.)

Q. Did you submit to the Board for its approval or disapproval or confirmation or ratification the transaction had between you and Mr. Peter Bercut?

A. Nothing, no.

Q. The answer is you did not?

A. I have already answered that.

Q. All right.

A. I haven't submitted that to any Board for approval.

Q. All right. Now, you are familiar with the powers of the officers and directors which are found in the minute books or in the by-laws, aren't you, Mr. Arnold? You read those?

A. Yes, I am familiar.

Q. Did you read the section dealing with the executive committee and its powers?

A. Yes, I am familiar with it.

Q. I will ask you to look at page 30 of Volume I of the minute books, which deals with the by-laws of the corporation, entitled, "Powers of the Executive Committee." Will you please read that, and then state whether or not you submitted the transaction to the Board of Directors for its approval or disapproval or ratification or confirmation?

A. No, I did not.

Mr. Brownstone: May I see that, please?

(Examining minute book.)

Mr. Scampini: Q. Now, will you please state whether the subdivision entitled "Powers of the Executive Committee" was in full force and effect

(Deposition of Lloyd R. Arnold.)

on January 8th, 1941, and in full force and effect on August 20th, 1942? A. Yes, it was.

Mr. Scampini: No further questions.

Mr. Goodman: I will have quite a little cross-examination.

(Discussion off record.)

Mr. Scampini: Let the deposition be regularly adjourned until Saturday, September 19th, at the hour of 9:30 o'clock A. M., and the witness will return for further testimony.

(Thereupon an adjournment was taken until Saturday, September 19th, 1942, at 9:30 o'clock A. M., and by consent of counsel to be resumed at the same place.)

Room 816, No. 300 Montgomery Street,
San Francisco, California,

Saturday, September 19, 1942, 9:30 A. M.

(Pursuant to the foregoing adjournment the deposition of the witness,

LLOYD R. ARNOLD,

at the above time and place was resumed, there being the same appearances as hereinbefore noted.)

LLOYD R. ARNOLD,

recalled as a witness, having been previously sworn by the Notary Public to tell the truth, the whole

(Deposition of Lloyd R. Arnold.)

truth, and nothing but the truth, testified as follows:

Direct Examination

(Resumed)

Mr. Scampini: I want to ask a few more questions before closing, if I may.

Mr. Goodman: You say you want to ask a few more questions?

Mr. Scampini: Yes, if I may.

Mr. Goodman: Yes, certainly.

Mr. Scampini: Q. Mr. Arnold, approximately what month of 1940 was it that you first approached Mr. Peter Bercut on the proposed transaction?

A. Well, I would think—let's see—the deal was closed on the 8th of January. I would think sometime in November. If I refresh my memory on that, I could probably give that closer.

Q. Would you say approximately three months before it was finally concluded?

A. I have always thought it was about sixty—somewhere between sixty and ninety days, probably.

Q. How often did you talk to him during that period of time concerning this proposed transaction? A. Well, numerous times.

Q. At what price did you first propose to sell the shares or under what terms and conditions did you first submit a proposal to him?

A. Well, as far as the terms and conditions are concerned, it is somewhat vague, but I guess we

(Deposition of Lloyd R. Arnold.)

started out somewhere around \$75,000.00. Of course, that wasn't for an out-and-out sale.

Q. Now, did you approach him as a director of the company, Mr. Arnold?

Mr. Goodman: Well, I think that calls for the witness' conclusion and opinion.

Mr. Scampini: Strike that out, then.

Q. Why did you approach Mr. Peter Bercut?

A. Well, Mr. Bercut had been associated with us for years, and I considered——

Q. By "associated"—what do you mean by "associated"? A. In a business way.

Q. Well, explain what you mean by "associated with us." What do you mean?

A. Well, he had been appointed a director of the company, and he had been during the last year even closer by being on the Board of the Merchants and the bank. At that time our whole plan—or before these negotiations — was to endeavor to strengthen the organization by some one who had more resources than we had.

Q. By that do you mean that the holding company found itself in a position where it had to have some financial aid and assistance? Is that what you mean? A. Yes.

Q. Did you approach him for the purpose of obtaining that financial aid and assistance?

A. That was the purpose of it.

Q. And what did you propose to him, Mr. Arnold?

A. We proposed to him to enter into a—well,

(Deposition of Lloyd R. Arnold.)

more or less—what we were trying to work out was a split of the stock that we owned. We didn't feel sure that we could keep it in control, and probably would have to take a minority position. It was more or less to work it out; if it weren't a corporation, a partnership, with the idea of bringing in——

Q. A partnership between whom?

A. Between Mr. Bercut and the holding company for the purpose of bringing in some — in other words, we had the assets, but we didn't have the necessary cash to round out the program.

Q. Now, at that time what did you consider the reasonable value of that block of stock held by the holding company in the Merchants Ice & Cold Storage Company to be?

A. Well, even though we started out at \$75,000.00, it didn't necessarily mean the value of it. We placed a higher value on that—a going concern. However, the situation was such that we had to work out the association or partnership.

Q. And by “association”—by “the situation was such,” do you mean that the financial condition of the holding company was such that you were under a sort of pressure to dispose, or——

A. We were under pressure from all sources. By “all sources” I mean——

Q. Now, when you first submitted the proposal to Mr. Peter Bercut, what was his reaction?

A. Well, I believe his first reaction was to look into the matter more thoroughly, and he stated he was interested.

(Deposition of Lloyd R. Arnold.)

Q. Did he say he was interested in his individual capacity, or what?

A. I assumed it was in an individual capacity. I don't know whether he stated that or not.

Q. Did he ever express his views to you as to what the company should get for the sale of a portion or the whole of this block of stock?

A. We stated what we wanted to do, and there was no——

Q. Now, when you say "we," what do you mean by "we"?

Mr. Goodman: Let him finish his answer.

Mr. Scampini: Q. When you say "we"——

A. Well, myself on behalf of the holding company.

Q. All right.

A. We stated the plan that we wanted to work out. At the beginning he didn't state any figure. It more or less ended up with the figure at which we sold.

Q. Now, you finally fixed the price of \$35,000.00 for all of this stock?

A. Well, I think we got down around fifty thousand, and Mr. Bercut went away, and I think Mr. Bercut stated that he couldn't pay that amount of money with the uncertainties existing.

Q. Then what happened?

A. Well, I went to the Pacific National Bank to find out what we could get the stock loose for, and after we got through talking about the whole deal,

(Deposition of Lloyd R. Arnold.)

our obligation to the Merchants and everything, why, we had to pay in \$25,000.00 to the Merchants.

Q. Yes, I know, but who finally said, "I'll pay you thirty-five thousand," or, "I'll sell for thirty-five thousand"? Who fixed the price at the end of the negotiations? How did the price come down from seventy-five to twenty-five? How did that happen?

A. When we got down near the last, why, Mr. Bercut stated he wouldn't pay any more.

Q. And what did you do when he told you that?

A. Well, we were very much upset about it—I recall that—because we wanted more.

Q. Now, did you——

A. And furthermore—in other words, we weren't working out the deal that we had attempted to at all. We were down to, instead of maintaining an interest in it as associates, why, we were selling all of our stock with the opportunity with an option to buy it back—buy a portion of it back.

Q. And when Mr. Bercut finally made that proposal to you, what did you say to him, if anything—the proposal of \$35,000? By that I mean the proposal of thirty-five thousand for all of it, with an option back to the company to buy a portion of it back? What did you say to him?

A. Well, I don't exactly know what I said, but I think I expressed myself, well, that we had to make the deal.

Q. What do you mean by "we had to make the deal"? Why did you have to make the deal?

(Deposition of Lloyd R. Arnold.)

A. Well, because of the general pressure and the conditions that I mentioned the other day here.

Q. By that you mean the holding company had to make the deal? Is that right? Or who had to make the deal? Whom do you mean by "we"?

A. When I say "we" I am speaking of the holding company. I had no personal interest—

Q. You mean you were acting on behalf of the holding company? Is that right?

A. Yes, that is right.

Q. But you had never discussed it with the board of directors? You were just assuming—you were acting on behalf of the holding company, and you were assuming that you were representing the holding company? Is that right?

A. Yes, that is right.

Q. You were trying to make the best possible deal that you thought you could make for the holding company? Is that right?

A. That is everything we were trying to do.

Q. And Mr. Peter Bercut was trying to make the best possible deal for himself? Is that right?

A. I presume that is correct.

Q. Well, he never offered at any time during the course of the negotiations to pay the price that you felt the holding company should receive, did he?

A. No, I think we hesitated a little bit around fifty thousand before he went away, but—

Q. But when he left you to go away, at which

(Deposition of Lloyd R. Arnold.)

time the price had already come down to fifty thousand, what was his last word to you?

A. You mean before he left us?

Q. Yes.

A. Well, he wanted to think it over.

Q. How long did he think it over?

A. Well, now I don't know how long, but I believe he wanted some sort of vacation at that time. It must have been——

Q. How long was he away?

A. Well, I don't know. It must have been a couple of weeks or so, I guess.

Q. And what happened after he came back? Did you contact him or did he contact you?

A. No, he contacted us.

Q. And what did he say to you?

A. I'm trying to recall whether—when he first came back, whether he just about turned the deal down or whether he was just hesitating on it and he turned it down later; I can't recall.

Q. Well, when he did turn the deal down, what deal did he turn down?

A. I think he turned down the deal that he didn't—he didn't want it.

Q. Well, what was that deal that he didn't want?

A. Well, he didn't want anything to do with buying any interest in the Merchants, or any part of it, for that matter.

Q. At what price?

(Deposition of Lloyd R. Arnold.)

A. I think before that we were talking about fifty thousand.

Q. All right.

A. Whether we were down to thirty-five thousand or not, we got down there on or about that time, I know.

Q. Well, when it got down to thirty-five thousand what did he say?

A. He was very positive one day that he didn't want it.

Q. Well, when was it that he didn't want it?

A. You mean the date or——

Q. Approximately when?

A. When he returned. I think probably right after the first of the year—right after New Year's.

Q. At what price was it that he didn't want it?

A. Thirty-five thousand, or any price.

Q. Or any price. Well, then, how did you finally make a deal with him? How did that come about?

A. I asked him to look into it further. In fact, I think I made arrangements for him to meet Mr. Gaither over here, because our backing wasn't in too good shape, and Mr. Gaither was interested in it. I don't mean Mr. Gaither personally. I mean the bank was interested.

Q. All right. Then what happened?

A. Well, Mr. Bercut then, after looking into it further and I believe talking to the bank, and I don't know, probably others——

Q. Others? Who?

(Deposition of Lloyd R. Arnold.)

A. Well, I don't know—his own associates; none that I knew.

Q. I see. A. That he decided to take in.

Q. For what price?

A. Thirty-five thousand.

Q. Well, now, when he decided to take it for thirty-five thousand, did you offer the same block of stock to anybody else on the open market or otherwise for the sum of \$35,000.00? A. No.

Q. Did you ask for a few days within which to see whether you could get a better price than \$35,000.00? A. No.

Q. Did you make any effort from any other source to obtain a better price than \$35,000.00?

A. You mean after Mr. Bercut had stated he would take it for thirty-five?

Q. Yes. A. No.

Q. Well, during the course of negotiations with Mr. Peter Bercut, did you try from any source whatsoever to get a better price than \$35,000.00?

A. At the beginning of conversations with Mr. Bercut there might have been an overlap. We were talking over here at the bank, one place in particular, for a better price, yes.

Q. Did you go back to that particular source to see if you could get a better price than \$35,000.00, after you had finally agreed with Mr. Bercut?

A. No.

Q. Did Mr. Peter Bercut ever ask that a directors' meeting be called to pass upon the transaction,

(Deposition of Lloyd R. Arnold.)

to determine the advisability of disposing of this block of stock?

A. I don't recall that he did.

Mr. Scampini: I want for the purpose of the record, while you are here, being that you are secretary—unless it can be stipulated that we identify these ledgers and have them marked. (Producing books.)

Q. Will you take a look at those books and tell us whether or not they are——

A. Yes, those are the company books——

Q. Who kept those books?

A. Mr. Heer kept them.

Q. Mr. Heer kept them? A. Yes.

Mr. Goodman: You can offer them for identification.

Mr. Scampini: Q. Did you work on them yourself? A. No.

Q. Mr. Heer worked on them? A. Yes.

Q. Did he work on them under your supervision?

A. Well, yes, I guess he did.

Mr. Scampini: For the purpose of identification I ask that you mark as the exhibit next in order the book entitled "Current Records of Pacific Empire Holdings" as "A", the general ledger as "B", and the journal as "C".

(Said books marked "Plaintiffs' Exhibits 5-A, 5-B and 5-C for identification.")

Q. Now, you are familiar with the provision in the by-laws of the corporation, Mr. Arnold, concerning the powers of the executive committee?

(Deposition of Lloyd R. Arnold.)

A. Yes.

Q. Which you examined the other day?

A. Yes.

Q. And the board of directors? A. Yes.

Q. In which it stated that the executive committee has all the powers of the Board, subject to the right of the Board to disaffirm the action? Do you remember that? A. Yes.

Q. Did you ever bring up to the Board of the Pacific Empire Holdings the transaction wherein or whereby you and Mr. Maffei and Mr. Peter Bercut together worked out this transaction?

A. No.

Q. Was the board of directors of the Pacific Empire Holdings ever given an opportunity to affirm or disaffirm the transaction?

Mr. Goodman: Well, now, I think that calls for the opinion and conclusion of the witness, and I will object to it.

Mr. Scampini: Answer the question, and the Court can rule upon it.

A. No.

Mr. Scampini: No further questions.

Mr. Goodman: Is that all?

Mr. Scampini: Well, I will go farther, so as to cure Mr. Goodman's point.

Q. Was any meeting of the board of directors of Pacific Empire Holdings, Inc. ever held after the transaction with Mr. Peter Bercut was entered into, for the purpose of acting upon or taking action upon the transaction, to your knowledge?

(Deposition of Lloyd R. Arnold.)

A. Was a meeting held for that purpose?

Q. Yes. A. No.

Mr. Scampini: No further questions.

Cross Examination

Mr. Goodman: Q. Mr. Arnold, at the time of this transaction with Mr. Bercut, you were an officer of the Merchants Ice & Cold Storage Company?

A. Yes, I was.

Q. You were the president?

A. The president.

Q. And how long prior to the transaction with Mr. Bercut in January of 1941 had you been the president of the Merchants Ice?

A. I believe I was finishing up my second year.

Q. Prior to the time that you were president of the Merchants Ice, were you a director?

A. Yes.

Q. And how long were you a director prior to the time that you became president?

A. I think two or three years.

Q. Now, at the time of the transaction with Mr. Bercut in January of 1941, there were seven directors of the Pacific Empire Holdings Company, were there not? A. Seven is correct, yes.

Q. Yourself, Mr. Bercut, Mr. Maffei, the president—— A. Yes.

Q. Mr. Richards—— A. Yes.

Q. Mr. Heer—— A. Yes.

Q. Mr. Ryerson—— A. Ryerson.

Q. And Mr.—— A. Giachino, I believe.

(Deposition of Lloyd R. Arnold.)

Q. Giachino? A. Giachino.

Q. Now, who was Mr. Ryerson?

A. Mr. Ryerson was the president of the California Pacific Service Company, a laundry company—a laundry operating company.

Q. And who was Mr. Giachino?

A. I don't know just what he does do. He is a little rancher, I believe, across the bay in Alameda.

Q. Mr. Richards at that time was connected with a frosted food company, wasn't he?

A. Yes, he was at that time.

Q. What was Mr. Maffei's business at that time?

A. Well, Mr. Maffei's business at that time was president of the Pacific Empire Holdings.

Q. Aside from that did he have any occupation or business or calling? A. I don't believe so.

Q. None at all?

A. You mean other than his connection with the Holdings Company?

Q. Yes. A. Not at that time.

Q. The Pacific Empire Holdings Company was, as its name implies, a holding company?

A. That is correct.

Q. You didn't have to conduct any business in the Pacific Empire Holdings Company except to watch out for these important investments that the Pacific Empire Holdings Company had?

A. Well, it wasn't an operating company, if that is what you mean.

Q. And the sole business of that company was to

(Deposition of Lloyd R. Arnold.)

safeguard and watch out for and take care of the investments that that company had? Isn't that right?

A. Yes, supervise its operating companies.

Q. And were you the man who was in the nature of manager of the affairs during that period of time?

Mr. Scampini: I will object to that as asking for the conclusion of the witness. The minutes and by-laws will speak for themselves. There is a conclusion of law there. He was vice-president and secretary, as far as I can observe, and that is about as far as you can go in that respect, Mr. Goodman.

A. Do you want me to answer that?

Mr. Goodman: Q. Yes, if you will.

A. In my capacity, I believe that I was, yes.

Mr. Scampini: I move to strike the answer as not responsive to the question and being a pure conclusion of the witness.

Mr. Goodman: Q. It is a fact, is it not, Mr. Arnold, that you did actually manage what affairs there were of the Pacific Holding Company?

Mr. Scampini: I object to the question as asking for the conclusion of the witness and as asking for something which is trying to prove agency or power in a manner not consistent with the statute in that respect, and that he isn't competent to testify to his own powers, and that the records of the corporation will express the extent of his powers

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: Q. Will you answer the question?

A. Well, I do want to say this right there, that I more or less managed the affairs. It was all under the complete—under the supervision of Mr. Maffei; I mean everything that was done, he knew about.

Q. Now, prior to that time what was the business of Mr. Maffei?

A. You mean prior to the——

Q. Prior to the date of this transaction with Mr. Bercut?

A. Well, you are going a long ways back. I met Mr. Maffei when I was hired by Mr. Stratton. That was away back in '29.

Q. What was Mr. Maffei's business at that time?

A. I don't believe I can tell you exactly what it was. I know what some of his business was before he was with the company, but as to what it was when he came with the company I am frank to say I don't know.

Q. You yourself had been a bank clerk, had you not?

A. I started out that way, yes.

Q. And you had some knowledge of financial affairs?

Mr. Scampini: Well, that is asking for the conclusion of the witness, too.

Mr. Goodman: Q. That is right, isn't it?

(Deposition of Lloyd R. Arnold.)

A. Well, I presumed I did. It isn't very evident, I guess.

Q. And it is a fact, is it not, that you did, subject to consultation with Mr. Maffei, actually conduct what business affairs there were of the Pacific Empire Holdings?

Mr. Scampini: I object to that question as an attempt to prove agency and power in a manner not consistent with the statute and——

Mr. Goodman: I am not asking for any of his powers. I am asking what he did.

A. I didn't conduct all of those things, no. In the Holdings Company Mr. Maffei and I—there were certain things that he was qualified to do and did, and certain things that I was more qualified to handle, and I would handle them.

Q. What were the things that Mr. Maffei was qualified to do, the best of your recollection?

A. Well, in things directly affecting the holding company.

Q. What, for example?

A. Well, for instance, our backing, through the Pacific Empire Corporation—he was active with the bank as our representative; he spent a lot of time around the Merchants there before I was president and while I was.

Q. Now, during the year prior to the transaction with Mr. Bercut in January, 1941, it is a fact, is it not, that the financial condition of both the Merchants Ice and the Pacific Holdings Company was becoming acute? That is true, isn't it?

(Deposition of Lloyd R. Arnold.)

A. Yes, that is correct.

Q. The Merchants Ice was having increasing difficulties in paying its debts and meeting its payroll during that period of time? A. It was.

Q. It is also a fact, is it not, that during that same period of time—that is, the year prior to the transaction with Mr. Bercut—the bonds of the Merchants Ice were selling at a very low price?

Mr. Scampini: Now, that is an incompetent, irrelevant and immaterial question, and I object to that question.

A. I don't know as they were lower than they had been after we had taken over the Merchants; they were down as low as thirty-five when we first went in there.

Mr. Goodman: Q. Well, during the period of, say, the year preceding the transaction with Mr. Bercut the bonds on the market were down lower than \$60.00 a share, weren't they?

Mr. Scampini: Well, I object to that on the ground they will speak for themselves, and you are asking for the conclusion of the witness.

Mr. Goodman: Well, the witness knows.

Mr. Scampini: Well, they will speak for themselves.

A. Well, I didn't pay a lot of attention to the bonds, because we couldn't buy any. What price did you say?

Mr. Goodman: Q. Lower than \$60.00 a share.

Mr. Scampini: What do you mean by "\$60.00 a share"?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: \$60.00 a bond.

A. A bond, yes.

Mr. Scampini: \$60.00 on the hundred?

Mr. Goodman: Yes, \$60.00 on the hundred.

A. I didn't think they were that low. I thought they were around seventy, but maybe they were around there.

Q. During the same period of time the Crocker Bank had made demands on the Merchants Ice to cure some violations of a trust agreement, had it not? A. Yes, it had.

Q. There was difficulty in getting money to buy shares in the Merchants Ice during that period of time? A. Yes, there was.

Q. Were there any objections made by the directors of the Merchants—during that period of time were there any objections made by the directors of the Merchants Ice to the management of the Merchants Ice? A. Yes, there was.

Q. Were there any requests made in the meetings of the directors of the Merchants Ice to change the management of the Merchants Ice?

A. Was there any request?

Q. Made during the meetings of the directors of the Merchants Ice to make a change of management of the Merchants Ice?

A. Not any formal request. There was one director made that statement, yes. In fact, he——

Mr. Scampini: "Made that statement." You mean "made that suggestion"?

(Deposition of Lloyd R. Arnold.)

A. Suggestion, yes.

Mr. Goodman: Q. And was it suggested by any of the directors at the meetings of the directors of the Merchants Ice that Mr. Bercut assume some active position in the Merchants Ice?

A. Yes, that statement was made.

Q. And at the time of this transaction it was—strike that out. Prior to the transaction with Mr. Bercut you were seeking to find some way to get the Merchants and the Empire Holdings Company out of their difficulties, weren't you?

A. Yes, I was.

Q. And you were seeking to interest other capital or a competent association to work out those difficulties, weren't you? A. I was.

Q. At that time did you consider that Mr. Bercut was a business man of capacity?

A. I did.

Q. And that was also the opinion of Mr. Maffei, was it not? A. Yes, it was, I believe.

Mr. Scampini: Mr. Maffei will speak for himself. We can also stipulate to that fact, Mr. Goodman.

Mr. Goodman: Q. And it was also your opinion and Mr. Maffei's opinion that—

Mr. Scampini: Just a moment, now. I raised the objection that you cannot prove by this witness what Mr. Maffei's opinion was. I will stipulate that Mr. Bercut was a man of business capacity.

Mr. Goodman: Now, Mr. Scampini, I am not

(Deposition of Lloyd R. Arnold.)

interested in what stipulations you are willing to make. This is the cross examination of this witness as to the circumstances under which this transaction was entered into, and it is proper cross examination in every respect.

Mr. Scampini: But I raised the objection then as to proving by this witness what Mr. Maffei's opinion was with respect to any matters, as asking for the conclusion of the witness.

Mr. Goodman: He knows what Mr. Maffei's opinion was. If he doesn't know, he can so state.

Q. Now, was it or not your opinion and Mr. Maffei's opinion that Mr. Bercut was the type of man that would bring considerable standing as well as financial assistance to the operations of both the holding company and the ice company?

A. I knew that such an association would certainly bring in lots more than we had.

Mr. Scampini: I move to strike out the answer as not responsive to the question.

Mr. Goodman: Will you read the question again, Mr. Reporter?

(Pending question read.)

A. I knew that it would bring credit and standing to the company, more than we had, yes.

Q. And from your discussions with Mr. Maffei, you knew that Mr. Maffei was of the same opinion, did you not?

(Deposition of Lloyd R. Arnold.)

A. We weren't in any disagreement that I knew of.

Q. Now, I wish you would answer that question.

A. Well, yes.

Q. This transaction with Mr. Bercut was initiated by yourself, was it not? A. Yes.

Q. And because of the necessities of both companies—that is, the Merchants and the holding company—you were seeking to get financial help and additional leadership? That is correct, is it?

A. That is right.

Q. And when you first took up the transaction with Mr. Bercut, it is a fact, is it not, that he was reluctant to go into the deal?

A. At first he merely expressed interest—that is all.

Q. And isn't it a fact that he also told you at the time that he had many other business interests and was not anxious to increase his responsibility?

A. I believe he mentioned that at one time, yes.

Q. Did Mr. Bercut at any time bring any pressure to bear upon you or urge you to make the transaction?

Mr. Scampini: I object to that as asking for the conclusion of the witness.

A. I couldn't term it "pressure," no.

Mr. Goodman: Q. Well, did he ever urge you to make the transaction?

A. Not in that sense of the word, no.

(Deposition of Lloyd R. Arnold.)

Q. Did you ever consider that you were making any improper transaction with Mr. Bercut?

A. It would not be improper. That is not the word.

Q. As a matter of fact, you considered that you were making as good a deal as, under the circumstances, you could make for the Empire?

A. It was very necessary that I work out something that would be beneficial or that would at least solve some problems that existed then for both companies.

Q. And you considered then that you were acting in a perfectly fair and proper way, did you not?

A. I was trying to work out the best deal I could.

Q. Didn't you consider that you were acting in a perfectly fair and proper manner in making this transaction?

Mr. Scampini: I will object to the question as entirely incompetent, irrelevant and immaterial.

A. I was acting properly, yes.

Mr. Scampini: That is asking for the conclusion of the witness, and I move to strike out the answer as being a mere conclusion.

Mr. Goodman: Q. Have you ever read or seen the complaint in this action?

A. I have never read it really through, but I saw part of it, yes.

Q. And when did you see the complaint, Mr. Arnold?

(Deposition of Lloyd R. Arnold.)

A. Well, I think it was about, maybe a week ago, I guess.

Q. Is that the only time you have ever seen it?

A. I believe it was.

Q. And where did you see the complaint?

A. I saw it here.

Q. In Mr. Scampini's office?

A. In this office, yes.

Q. Where did you say, Mr. Arnold?

A. In this office—I mean in this building—in these offices, I meant to say.

Q. Yes. And you came into Mr. Scampini's office and there read the complaint about a week ago?

A. I didn't read it thoroughly, as I just said; I just glanced at it.

Q. You glanced at it; and that was the one and only time that you did glance at it?

A. Yes, I believe it was.

Q. And that was prior to the time that your deposition was arranged for?

A. Well, yes, I believe so.

Q. And up to that time you had not seen the complaint?

A. You mean up to the time of my deposition?

Q. Up to the time a week ago, when you glanced at it.

A. No.

Q. At the meeting of the directors on August 20th, 1942, were you present?

A. Yes.

Q. Who else was present?

(Deposition of Lloyd R. Arnold.)

A. Let's see—all but one, I believe, Mr. Giacchino wasn't present.

Q. All the other directors were present?

A. That is right.

Q. Who called that meeting?

A. Well, I believe either Mr. Maffei or myself.

Q. Well, don't you know who called the meeting?

A. I believe we sent out notices, but a waiver was signed by everybody that signed the minutes.

Q. Who attended to that?

A. I attended to that.

Q. I beg your pardon?

A. I believe I attended to that.

Q. Did you prepare the waiver of notice of the meeting? A. No, I didn't.

Q. Who prepared it?

A. Well, Mr. Scampini's office here, I believe.

Mr. Scampini: Mr. Scampini did.

Mr. Goodman: Q. And prior to the preparation of the waiver of notice of the meeting of August 20th, 1942, did you have any consultation with Mr. Scampini concerning the calling of that meeting?

A. Yes.

Q. Where was that held?

A. Right here, I believe.

Q. And at whose request was the meeting held at Mr. Scampini's office—the preliminary meeting pertaining to the waiver of notice of the meeting of August 20th? A. At whose request?

(Deposition of Lloyd R. Arnold.)

Q. Yes.

Mr. Scampini: I object to all this line of examination as not being within the scope of the direct examination. If you want to know the facts, I will give them all to you, but I still object to it as not being within the scope of the direct examination.

A. Well, Mr. Maffei and I had an appointment here with Mr. Scampini.

Mr. Goodman: Q. And who arranged that appointment?

Mr. Scampini: That is incompetent, irrelevant and immaterial, and not within the scope of the direct examination, and I object to the question.

A. I am frank to say I don't exactly recall who did make the appointment.

Mr. Goodman: Q. Was Mr. Scampini at that time the attorney for the Pacific Empire Holdings?

A. No, he wasn't.

Q. Why did you come to his office?

Mr. Scampini: That is incompetent, irrelevant and immaterial and I object to the question as also not being within the scope of the direct examination.

A. I have already said that we had conversations before the meeting.

Mr. Goodman: Q. Who prepared the minutes of the meeting of August 20th, 1942?

A. They were prepared in this office.

Q. And were they prepared before or after the meeting of August 20th, 1942?

(No answer.)

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: Answer the question, Mr. Arnold.

A. Oh, I thought that was still—I beg your pardon.

Mr. Scampini: I am not waiving my objection, but answer the question.

A. Well, they were prepared before, I believe.

Mr. Goodman: Q. Who is Rebecca Tanzer?

Mr. Scampini: I object to that as being incompetent, irrelevant and immaterial and not within the scope of the direct examination.

A. Without looking it up, I would assume that she was a stockholder.

Mr. Goodman: Q. You say she is a stockholder?

A. I say without looking it up, I assume she is.

Q. Do you know her? A. No, I don't.

Q. And who is Elizabeth Wilhelm?

A. I don't know the party.

Q. You don't know her at all?

A. I don't know her. It may be a stockholder; I assume it is a stockholder.

Q. Was there a man by the name of Wilhelm at any time connected with the Pacific Empire Holdings Company? A. Wilhelm?

Q. Yes.

A. Not within my knowledge—not unless it was before I was there.

Q. Or with any of the associated companies—do you know? A. No, I don't know the party.

Q. You said Mr. Scampini was not attorney for the Pacific Empire Holdings Company at the time

(Deposition of Lloyd R. Arnold.)
of this meeting of August 20th, 1942?

A. I did, yes.

Q. How long previous to that had it been since he was the attorney for the Pacific Empire Holdings Company?

A. I believe Mr. Scampini resigned in 1936 or '37—somewhere along there. I would have to look it up.

Q. He had been attorney for the Pacific Empire Holdings?

A. Yes, he was the attorney for the Holdings.

Q. And he severed his connection several years ago—is that right?

A. Several years ago, yes.

Q. And from that time on he was not the attorney or one of the attorneys or counsel for Pacific Empire Holdings?

A. I am afraid you will have to ask that again. Some of these cars go by here, and I don't get what your questions are.

Mr. Goodman: I am sorry. Will you read the question, Mr. Reporter?

(Pending question read.)

A. No, he was not.

Q. Was he representing or was he attorney, to your knowledge, for the Pacific Empire Corporation?

A. No, he was not.

Q. He was Mr. Maffei's attorney, was he not?

A. You mean personal attorney?

Q. Yes.

A. Well, I am frank to say I don't know.

and L. R. Arnold, secretary-treasurer.

Q. You don't know. Was the complaint in this action—strike that out. Did you know anything about the filing of the equity proceeding in Delaware for the insolvency of this corporation prior to the meeting of August 20th, 1942?

A. Yes, I did.

Q. How long before?

A. Well, we were advised that action was being taken, I'd say about—I would say it was a month before—if I look at that letter I could tell you; I don't know the date of it; I would say about three or four weeks before, or a month before.

Q. When you say "we were advised," whom are you referring to?

A. The holding company and myself.

Q. And when you are referring to the holding company, are you referring to any other individual officer or director of the holding company, outside of yourself?

A. Mr. Maffei always.

Q. And how were you and Mr. Maffei informed concerning the pendency of that action?

A. Well, there was a letter that came from an attorney in Wilmington, Delaware, stating that he represented some stockholders, a group of stockholders who were making statements that they didn't care for the management of the company and that they wanted an accounting, and all that sort of thing.

Q. And was that the first time that you personally knew anything about the proceeding in Delaware?

A. Yes, it was.

(Deposition of Lloyd R. Arnold.)

Q. When you got the letter from the attorney?

A. Yes, it was.

Q. Had Mr. Maffei advised you concerning the matter at any time prior to the receipt of that letter from the attorney in Delaware?

A. No—undoubtedly no—no, he didn't; he wouldn't have known it.

Q. Well, however, whether he would or wouldn't have known it, did he at any time prior to the receipt of that letter tell you about any pending proceeding that might be initiated in Delaware?

A. No.

Q. You knew nothing about it prior to that time?

A. Not until I got that letter. The fact of the matter is that it arrived on the same date we got notice of another suit, and I thought it was one and the same thing.

Q. And prior to the receipt of that letter had you been advised by Mr Scampini of the pendency of any such proceeding?

A. I don't believe so, no.

Q. Did you make any inquiry after the receipt of that letter as to how or in what manner the equity proceeding in Delaware had been initiated?

Mr. Scampini: Now, Mr. Goodman, you know very well—I am not objecting to your getting all the facts you want, but it certainly is not within the scope of the direct examination, and I raise the objection that you are going away outside the subject of the direct examination. You can prove

(Deposition of Lloyd R. Arnold.)

anything you want in your own manner, but not in this manner.

Mr. Goodman: Q. Will you answer the question?

A. Well, it was a new proceeding to me, and I wanted to find out information about it. I am not versed in those things.

Q. Now, in the resolution that was adopted at the meeting of August 20th, 1942, did the corporation appoint any attorney to represent it in Delaware? A. Yes.

Q. And whom did it appoint?

A. It was the same name as the party that wrote that letter. We had to find out who it was, and we came to Mr. Scampini to find out.

Q. Well, why did you come to Mr. Scampini to find that out?

Mr. Scampini: What difference does it make to you, Mr. Goodman, why he came to Mr. Scampini in the first place? Clients come to you. Why did Mr. Peter Bercut come to you to handle this case? That is a silly kind of question, if you ask me. I object to it as not being a proper question in the first place, and certainly outside the scope of the direct examination.

A. We had no attorney at the time.

Mr. Goodman: Q. Well, was Mr. Scampini representing the company at the time of the meeting of August 20th, 1942? A. Yes, he was.

Q. And these minutes of the meeting of August

(Deposition of Lloyd R. Arnold.)

20th were prepared by him for the company, of course, then? A. Yes.

Q. Now, who suggested at the meeting of August 20th, 1942, the name of the attorney who was to represent the corporation in the Delaware proceeding?

Mr. Scampini: Mr. Scampini.

A. Well, I was about to say that we neither had the knowledge nor the ability to get anybody there, and we asked Mr. Scampini to do that. We came here to get help when we got that letter.

Mr. Goodman: Q. Did Mr. Scampini advise you in the meeting of August 20th, 1942, that he contemplated filing an action for the receiver in Delaware against Mr. Bercut?

A. Well, no, we mainly went—we came here to seek——

Q. You can answer that “Yes” or “No.” Did he advise you at the meeting of August 20th, 1942, that he intended to file an action on behalf of the receiver as against Mr. Bercut? A. Yes.

Q. And did he state that he intended to file that action?

A. After discussion it was stated that the action would be taken.

Q. And thereupon the resolution was adopted which is in the minutes of the meeting of August 20th, 1942? A. Yes, that is right.

Q. Authorizing the appointment of an attorney

(Deposition of Lloyd R. Arnold.)

for the corporation in the proceeding in Delaware to consent to the insolvency proceedings there?

A. That is right.

Q. So that the purpose of the meeting of August 20th, 1942, was, was it not, Mr. Arnold, that the corporation should take this proceeding—pass this resolution so that it could accomplish the insolvency proceeding in Delaware and the bringing of this action against Mr. Bereut by the receiver?

A. Well, yes, the whole thing was to restore its solvency, or to keep it solvent.

Q. And in that proceeding, at that meeting Mr. Scampini was acting as the attorney for the corporation, was he not—the Pacific Holdings Company?

A. At that meeting, yes.

Mr. Goodman: In connection with the testimony of this witness I ask for the production by counsel for the Pacific Holdings Company, Mr. Scampini, of his correspondence initiating the insolvency proceeding in Delaware, with any firm, corporation or attorney in Wilmington, Delaware.

Mr. Scampini: Well, you can ask for it when the court orders it to be produced.

Mr. Goodman: Do I understand counsel will not produce it at this time?

Mr. Scampini: You haven't demanded it. It is not within the scope of the direct examination. You have no right to do it. If the court orders it, it shall be produced.

Mr. Goodman: At this time I give notice that I

(Deposition of Lloyd R. Arnold.)

will, in connection with the proceedings of this deposition, move the court for the production of this correspondence to which I have referred.

Mr. Scampini: Yes.

Mr. Goodman: And that in the event that it is not produced, that I will move to suppress the deposition on the ground that the documents which have been requested have not been produced.

Mr. Scampini: Very well. Make your motion.

Mr. Goodman: Q. Now, why was it that the name of the attorney that was selected to represent the corporation and consent to the insolvency proceedings was not included in the resolution, if you recall?

A. The only thing that I could say, the only reason I could give, would be that we didn't know who the court—I presume the court would appoint——

Q. No, I am talking about the attorney to represent the Pacific Empire Holdings Company in the insolvency proceeding in Delaware.

A. Mr. Scampini being our attorney here, we had asked him to get an attorney for us there. I assumed we had to have one there.

Q. Now, there was no resolution proposed at that meeting authorizing the corporation to file a complaint against Mr. Bercut, was there?

A. I would have to refer to the minutes. I don't know whether there is a direct resolution there or not.

Q. Suppose you look at it and see whether or not—it isn't there; to assist you in answering the

(Deposition of Lloyd R. Arnold.)

question, it isn't there. I am asking you whether or not any such resolution was proposed, to your knowledge?

A. I am familiar with the whole subject, but I didn't know whether an actual resolution was adopted or not.

Mr. Scampini: The minutes speak for themselves, don't they, Mr. Goodman?

Mr. Goodman: I know that, but I am asking him whether or not, aside from what appears in the minutes, any resolution was proposed or adopted.

Mr. Scampini: That is incompetent, irrelevant and immaterial. Suit was filed, wasn't it? That is what you are here for. Or do we have to have a resolution authorizing the filing of a suit, but no resolution authorizing the sale of Merchants Ice to Mr. Peter Bercut? It is outside the scope of the direct examination. I further raise that objection.

A. There was no resolution adopted, apparently.

Mr. Goodman: Q. And, so far as you can recall, no such resolution was proposed at that meeting?

A. The subject we mentioned was undoubtedly discussed, but I don't believe it was put in any formal resolution.

Q. Now, at this meeting of August 20th, 1942, at which Mr. Scampini, the attorney for the Pacific Empire, was present, you had a discussion, did you not, concerning this transaction with Mr. Bercut in January, 1941?

A. All matters relating—not all, but I mean any-

(Deposition of Lloyd R. Arnold.)

thing that led up to its condition, was discussed.

Q. Well, at this meeting of the directors did you make statements of any kind concerning the facts in connection with the agreement of January, 1941, with Mr. Bercut? A. Oh, yes, surely.

Q. And did you at that directors' meeting make any different statements than you have made today so far, or yesterday—or on Thursday, rather, in your testimony here?

A. I don't see how they could be any different. I have tried to confine myself to the facts.

Q. Will you answer the question? Did you make any statements that were contrary to or different than the statements you have made to us here in the course of your deposition? A. No.

Q. Did Mr. Maffei take part in the discussion concerning the Bercut transaction in the meeting of August 20th, 1942?

A. He took part in the discussion of that subject and any others relating to the company, yes.

Q. And did Mr. Scampini enter into the discussion concerning the Bercut transaction in January, 1941? A. Yes.

Q. And did he discuss those matters with you as directors of the company—as the attorney for the company at that meeting?

A. At that meeting, yes.

Q. Now, this was the first stockholders' meeting that the Pacific Empire Holdings had held since the transaction of January, 1941, with Mr. Bercut, was it not? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. When you read the complaint in this action about ten days ago, as you have stated—I will strike that out. At the time of the transaction of January, 1941, with Mr. Bercut, were you acquainted with any of his brothers in a business way at all—Henry Bercut or Jean Bercut or—I guess those are all—those two? A. I had met——

Q. But you had had no business transactions or relations with them at all up to that time, had you?

A. Wait just a minute. I don't recall who——

Q. But whatever acquaintance you may have had with any of Mr. Bercut's brothers up to that time would have been purely a most casual one? Is that a fact?

A. It would be through Mr. Bercut—Mr. Peter Bercut.

Q. And it would have been purely a most casual one?

A. I had no business dealings with Mr. Bercut's brothers up to that time, no.

Q. You don't recall at this time, as a matter of fact, whether you had ever met them up to that time? Isn't that true?

A. I have a recollection of meeting one of Mr. Peter Bercut's brothers at one time. I don't know just who—I couldn't state which one, I don't believe.

Q. Well, the extent of that, I assume, was more or less casual? A. Yes, it was.

Q. And in passing—is that right?

(Deposition of Lloyd R. Arnold.)

A. An introduction, or something like that.

Q. Now, when you looked at this complaint in this action about ten days ago, do you recall reading the following allegation in paragraph VII of the complaint: "Plaintiffs allege that the defendants—" that means the Bercuts —"and each of them at said time entered into a conspiracy with each other to acquire for themselves, for a nominal consideration, the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company through the use of the position, power and influence of said Peter Bercut with the management of Pacific Empire."

Do you recall saying that particular sentence in paragraph VII of the complaint?

A. I believe I saw it. As I said, I didn't read that thoroughly..

Q. Well, would you like to look at paragraph VII in there again? (Showing document to the witness.)

A. As I say, I read the whole thing.

Q. Yes. Now, at the meeting of August 20th, 1942—and of course I call your attention to the fact that that meeting was held long before this complaint was filed—was there any suggestion made by either you or Mr. Maffei that Mr. Bercut should be charged with conspiracy in obtaining stock of the—in entering into this transaction of January, 1941?

Mr. Scampini: The same objection which I have made to all this line of examination.

(Deposition of Lloyd R. Arnold.)

A. Well, there was a long discussion on the whole subject. Whether or not that term was used, I couldn't say.

Mr. Goodman: Q. Well, did either you or Mr. Maffei at that meeting directly say that, in your opinion, Mr. Bercut should be charged with conspiracy in the complaint to be filed by Mr. Scampini?

Mr. Scampini: I again renew my objection that it is incompetent, irrelevant and immaterial, and not within the scope of the direct examination, that it is an improper question, and has nothing to do with the issues of the case.

A. I don't believe that we used the word "conspiracy."

Mr. Goodman: Q. As a matter of fact that statement in the complaint—strike that out.

Mr. Scampini: As a matter of fact, for the purpose of the record, that statement in the complaint is the lawyer's opinion as to the situation, and was dictated by the attorney who drafted the complaint. That will appear in the record.

Mr. Goodman: Q. As a matter of fact, you knew at the time that you looked over this complaint about ten days ago that that statement in the complaint was not the truth, didn't you?

Mr. Scampini: I object to that as incompetent, irrelevant and immaterial. You are asking for the conclusion of the witness as to what constitutes conspiracy. It is a matter for the court to determine

(Deposition of Lloyd R. Arnold.)

from the facts. I object to any answer to that question or the propounding of the question.

A. Well, I don't know how to answer that.

Mr. Goodman: Q. Why don't you know how to answer that, Mr. Arnold?

A. Well, in other words, I could put it this way. Not being an attorney—I mean from a business standpoint, naturally any dealings that I had with Mr. Bercut, it wasn't as though we were trading on some deal with a stranger; he was in possession of all the facts of it.

Q. And you did not consider that Mr. Bercut was imposing upon you in any way, did you, at the time of this transaction?

Mr. Scampini: I still say that is incompetent, irrelevant and immaterial. The question is, did he impose upon the corporation—not upon Mr. Arnold.

Mr. Goodman: Q. Will you answer the question, Mr. Arnold?

A. I have answered it in other ways in my testimony. He wasn't imposing on me, if that is the word.

Q. And was Mr. Bercut, at the time of the transaction of January, 1942, exercising any power or influence over you or over Mr. Maffei as president of the company?

A. I don't know who would exert any power over me, or influence.

Q. And did Mr. Bercut at the time of this trans-

(Deposition of Lloyd R. Arnold.)

action exercise any power or influence over you in connection with this transaction?

A. Well, over me, no.

Q. Did he exercise any power or influence over Mr. Maffei, to your knowledge?

A. Not to my knowledge.

Q. During the period from about 1937, I will say, until January, 1941, did you actually ever hold any meetings of the executive committee?

A. Well, I held numerous meetings.

Q. I mean did you actually hold any formal meetings?

A. Those meetings were always held at either Mr. Maffei's office or mine.

Q. Who wrote up the minutes? A. I did.

Q. (Continuing.) Of the Executive Committee?

A. I did.

Q. Without intending any unpleasant or deleterious criticism, it is a fact, is it not, that aside from Mr. Bercut the other directors of the Pacific Holdings Company were in the nature of what is commonly known as dummy directors, were they not?

A. Well, now, wait a minute, wait a minute—

Mr. Scampini: I have an idea the answer to that is "Yes." Go ahead and answer the question.

A. Well, now, wait a minute.

Mr. Scampini: Or treated as such, anyhow.

Mr. Goodman: Q. That is about the truth, isn't it? Maybe Mr. Heer—we will leave him in, because he was an officer of the company; but the

(Deposition of Lloyd R. Arnold.)

other men were more or less dummy directors, were they not? A. I will answer it this way——

Q. Were they not—in the common sense of the word?

A. I will answer it this way: Are you classifying Mr. Bercut in your question?

Q. Well, you can leave him in or out, as you see fit.

A. I will answer that question this way: In the holding company or in any corporation I think, the management, the ones who are actually there, are certainly more active as directors. The men on that Board in their business capacity certainly weren't dummies.

Q. Well, so far as the affairs of the holding company were concerned, the management of the holding company conducted its affairs, didn't it, as is usually the case?

Mr. Scampini: What do you mean by "the management," Mr. Goodman?

Mr. Goodman: Q. I mean by that, Mr. Arnold, so you can see what I am getting at, that you and Mr. Maffei practically, for all practical purposes, managed the affairs, what affairs there were of this holding company? There isn't any question about that, is there?

A. Well, we managed them; and there were quite a lot of them during that period, too, incidentally.

Q. Yes. As a matter of fact, you more than Mr. Maffei, because——

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: It is argumentative.

Mr. Goodman: Q. (Continuing:) —particularly you, because of the fact that you were all of that time a director and part of the time president of the Merchants Ice & Cold Storage Company?

A. That is correct.

Q. Which was a big holding of the Pacific Empire Holdings Company, and you were in direct management and conducted the affairs of this holding company? A. Yes, that is correct.

Q. There is no question about that?

A. No question.

Q. And so far as the holding of directors' meetings or executive committee meetings were concerned, for all practical purposes those were formalities, were they not?

A. Well, I don't know that——

Mr. Scampini: The question is an argumentative question. I object to it.

Mr. Goodman: Well, the witness knows that.

Mr. Scampini: Well, the minute books will speak for themselves as to what the directors did. It is asking for the conclusion of the witness.

A. Every board of directors' meeting was properly called and regularly convened, and we always met in our directors' room.

Mr. Goodman: Q. Well, as a matter of fact you didn't complete the formalities on dozens of your directors' meetings? Isn't that right?

Mr. Scampini: That is an argumentative ques-

(Deposition of Lloyd R. Arnold.)

tion. I object to that question as assuming something not in evidence.

A. I didn't get that.

Mr. Goodman: Q. Well, I will put it this way to you: You are familiar with the minute books—you have looked at them from time to time?

A. Yes, I have.

Q. And you have no doubt noticed from an examination of the minute books that there were dozens of meetings of the Board at which the minutes weren't signed and at which consents were not signed?

Mr. Scampini: Well, now, I object to that question——

A. I can answer it.

Mr. Scampini: Wait a minute, now. I want to preserve the record, and then you can answer it. I will object to that question on the ground that it is incompetent, irrelevant and immaterial. There is nothing in the law requiring the minutes to be signed. That is only a formality. Whether or not they were lawfully convened and were present and acted upon the proposals that were submitted to them—that is the only thing that is required.

Mr. Goodman: I am asking for the witness' recollection of that.

Mr. Scampini: Then I submit that the minute books speak for themselves with respect to that question.

Mr. Goodman: Q. Will you answer the question?

(Deposition of Lloyd R. Arnold.)

A. I know that all those signatures of the directors aren't on every waiver there; I realize that. That is probably just due to negligence, because they had proper notice, in any case.

Mr. Goodman: Q. And that was equally true with respect to the meetings of the executive committee, was it not?

Mr. Scampini: The same objection.

A. It may be true, yes. I would have to look at those minutes.

Mr. Goodman: Q. Do you know how it came about that this proceeding was started in Delaware?

Mr. Scampini: Well, I renew my objection that it is *dehors* the record, outside the issues of the case; that you are now attempting a collateral attack; it is outside the scope of the direct examination; it is an improper question and incompetent, irrelevant and immaterial, and you haven't laid the foundation for it. It certainly is outside the issues of the case.

Mr. Goodman: Q. Do you know how it was started?

A. Well, if I can get what the question is—in other words, the first that we knew of any pending action was when we got our letter from Delaware. I certainly didn't know anything about that, where it came from or——

(Mr. Scampini hands letter to the witness.)

A. This is the one, yes.

Mr. Goodman: Q. Had you consulted with Mr.

(Deposition of Lloyd R. Arnold.)

Scampini before you received that letter from Delaware?
A. I don't believe so.

Q. Well, do you know whether you had or not?

A. I don't believe so.

Q. Did Mr. Maffei to your knowledge confer with Mr. Scampini before this letter was received?

A. Well, I don't know. I think we had luncheon once there. Mr. Maffei may have. I am not sure.

Q. Well, at the time of those luncheon meetings with Mr. Scampini did you have any discussion concerning the Bercut transaction with Mr. Scampini?

A. I had no discussion about any action of that sort, no.

Q. What if anything did you discuss with him concerning the bringing of the proceeding in Delaware, if you had such discussion?

A. No, that is what I say, we had no discussion along those lines. We had a general discussion. After all, Mr. Scampini was once connected with the company, and we discussed various things that had transpired in recent years.

Q. And among the matters that you discussed at these luncheon meetings with Mr. Scampini was the matter of the Bercut transaction?

A. It would have been discussed.

Q. Well, was it discussed?

A. That was discussed along with any other things in order——

(Deposition of Lloyd R. Arnold.)

Q. Well, your statement, then, is that it was discussed?

Mr. Scampini: "Yes"—isn't it?

Mr. Goodman: Well, I don't know.

Mr. Scampini: You have got it already in the record. What more do you want? I will stipulate that it was, to relieve you of all uncertainties.

A. Well, I was still talking about luncheons here. That is why I was hesitating—to see what it was.

Mr. Goodwin: Q. We are talking about the same thing, Mr. Arnold.

A. Yes, I believe it was discussed in those discussions.

Q. And how long would you say that it was that those luncheon meetings were held before the receipt of this letter from the attorney in Delaware?

A. Well, I don't know without having to think a lot. It was purely a social meeting, resuming our acquaintance after all——

Q. Well, would you say it was a month before you got this letter? Would that be a fair approximation of the time?

A. We owed Mr. Scampini money, and we talked on the phone—well, I would say during thirty or sixty days, along in there. I was away a lot.

Q. Well, had Mr. Scampini made any request for a settlement of his obligation of the company?

A. I think from time to time he had asked for some payments on it, yes.

Q. And did you propose any plan by which Mr. Scampini could get paid the amount that was owing

(Deposition of Lloyd R. Arnold.)

to him from the company? A. No, we didn't.

Q. Was there any discussion at any of those luncheon meetings as to any method of paying Mr. Scampini's unpaid bill for services to the company?

A. No, I believe we told him the same as we did everybody else, it was just one of those things—we couldn't pay it.

Mr. Goodman: May I see this letter? (Examining letter.) In connection with this witness' testimony I will ask that the letter of July 16th, 1942, from Thomas H. Wingate, Attorney at Law, Wilmington, Delaware, to Pacific Empire Holdings, Inc., be marked for identification.

Mr. Scampini: Well, I object to it, merely for the purpose of the record, on the ground that you are going outside the scope of the direct examination and the issues of the case, and it is incompetent, irrelevant and immaterial.

Mr. Goodman: May it be marked, Mr. Reporter, as "Defendants' Exhibit A for identification"?

(Said letter marked "Defendants' Exhibit A for identification.")

Mr. Goodman: Q. At the meeting of the directors of August 20th, 1942, was there any statement made by either Mr. Scampini or any of the directors or officers of the company that the corporation was going to be one of the plaintiffs in a proposed action against Mr. Bercut?

Mr. Scampini: I will object to that as incompetent, irrelevant and immaterial, and not within the

(Deposition of Lloyd R. Arnold.)

scope of the direct examination, and not having any bearing upon the issues of the case.

A. I would have to answer that this way, that a lot of matters were up for discussion, prompted by this letter, and we wanted to cooperate and go along with them.

Mr. Goodman: Q. And with whom did you want to cooperate and go along?

A. With whoever this group of stockholders were.

Q. And without knowing who they were?

A. Well, oftentimes in stockholders' actions you don't know. They get together, and there is nothing—

Q. Well, did you just determine in this meeting, without knowing more, that the corporation was going to cooperate with the stockholders of whom you knew nothing in Delaware?

Mr. Scampini: Well, Mr. Goodman, may I ask if that is any of your business?

Mr. Goodman: Oh, yes.

Mr. Scampini: What is the matter? Don't you like to have your client sued by a receiver?

Mr. Goodman: Well, now, Mr. Scampini, we have all been getting along very well in this examination—

Mr. Scampini: Why don't you wait until the time of trial, for the court to tell you whether this is proper or not?

Mr. Goodman: Well, because I see fit to do it

(Deposition of Lloyd R. Arnold.)

this way. If you have any objection, just make your objection.

Mr. Scampini: Well, Mr. Goodman, I haven't gone into the matter. You know that as well as I do, that that is a matter that is outside of the case.

Mr. Goodman: Well, that is where you and I disagree, Mr. Scampini. You make your objection, and we will let the court pass on it. Will you read the question, please?

A. I have forgotten where I left off.

(Pending question read.)

A. Well, I'll say this, that our whole conversations were based upon preserving the corporation. If it had any rights any place, why, the company was willing to join and go along on that basis in order to make the company—to cause the company to survive and go ahead, wherever it might lead.

Q. And was it the substance of your discussion at those directors' meetings that the only possible way that the company could preserve itself would be by bringing—joining in this equity proceeding so that an attempt could be made to proceed against Mr. Bercut to get the stock back in the Merchants Ice?

A. No. That is what I am trying to say. In other words, that was joined by this letter, this action—this threatened action; and after discussing everything with Mr. Scampini, the only solution seemed to be a receivership, with the idea of pro-

(Deposition of Lloyd R. Arnold.)

tecting the company and, if it had any rights legally or otherwise, to work it out.

Q. Well, you knew that the Pacific Empire Holdings Company at that time, and the time of this meeting, had no assets of any value at all, did you not—of any material value?

Mr. Scampini: It had none.

A. Well, I know this, that whatever we had or whatever we didn't have, we had ever since we left the Merchants been working on a plan where we could keep the company going.

Mr. Goodman: Q. Well, you have testified on your direct examination here, in answer to Mr. Scampini's question, that there were large amounts of money that the Pacific Empire Holdings Company owed, and that it had no assets of any value at all. That is right, isn't it? A. Yes, that is correct.

Q. All right. Now, what did you have in mind and what did you discuss at the directors' meeting of August 20th, 1942, about preserving assets of your company that were of no value in connection with this equity receivership?

A. Well, we hoped by putting it in receivership that we could probably settle with some of our creditors.

Q. How did you hope to settle with any of your creditors when you had no assets?

Mr. Scampini: For the purpose of the record let it be shown that I object on the ground that the question is argumentative and assumes something

(Deposition of Lloyd R. Arnold.)

not in evidence; that it is outside the issues of the case, and that our contention is that this company owns the Merchants Ice & Cold Storage Company stock of which Mr. Bercut claims to be the owner, and owns other assets of which other people claim to be the owners.

A. Well, as far as some other assets are concerned, why, it seemed to be the legal construction that we did own them, and the company could be put in receivership, or we could go ahead—which-ever was the best.

Mr. Goodman: Q. In other words, was the consensus of opinion, after you had consulted with Mr. Scampini at the directors' meeting, that the real purpose of the proceeding in Delaware was to arrange for the bringing of an action against Mr. Bercut to try and recover some assets? Isn't that right?

Mr. Scampini: I object to that as assuming something not in evidence and purely argumentative.

A. No, I can't say that that was the main purpose.

Mr. Goodman: Q. Well, what purpose did you have in mind, then, in consenting to an equity receivership away off in Delaware, Mr. Arnold, on the advice of Mr. Scampini, other than that you had no assets in the company?

Mr. Scampini: Well, that is an argumentative question and outside of this case, and incompetent,

and L. R. Arnold, secretary-treasurer.

irrelevant and immaterial, and not within the scope of the direct examination.

A. Well, answering your first question there, about the purpose——

Mr. Scampini: It is asking for a conclusion of law, too.

A. I don't know—I mean it was a Delaware corporation, and I thought you had to go to Delaware for anything like that, and that naturally came out after we asked Mr. Scampini what to do about this. As to whether its whole purpose was to proceed against Mr. Bercut, I can't admit that. It was after going to counsel or obtaining legal advice after this thing started; if the corporation had any rights or anything it could recover, or anything like that—well, that is entirely legal; I mean that is——

Mr. Goodman: Q. Well, in other words, I am correct in saying, am I not, Mr. Arnold——

Mr. Scampini: I object to your starting to say that you are correct in the way you are asking questions, Mr. Goodman. Let him answer subject to the objection.

Mr. Goodman: Well, Mr. Scampini, this is cross-examination. I am going to word my questions just exactly the way I want to, and there is no objection to it. It is proper cross-examination. I have a right to lead the witness——

Mr. Scampini: Oh, yes, I will stipulate to that.

Mr. Goodman: (Continuing:) ——in my ques-

(Deposition of Lloyd R. Arnold.)

tions in any way I want, so I am asking leading questions. I don't want to get in any argument over this thing.

Mr. Scampini: No, neither do I.

Mr. Goodman: But I just call your attention to the fact that you can't possibly have an objection to a question that I haven't even started to make yet.

Q. Mr. Arnold, am I correct in stating that after advising with your counsel you knew that the way and were informed that the way to bring the proceeding against Mr. Bercut to recover this stock or damages, was by going through this equity proceeding in Delaware?

A. I will have to say the same thing that I said before, that the directors were cooperating with whoever these stockholders were, to go along on any action. Naturally, we discussed all matters relating to the company, whatever its obligations and whatever assets it should have or could recover. It was all discussed, and the receivership seemed to be the only way to go about that to protect the corporation and—well, exercise whatever rights it might have legalwise, or whatever you want to call it.

Q. And among those rights that it might have legalwise was the question of the Bercut suit? That is correct, is it not?

A. Yes, that is correct.

Q. And you did discuss the matter of the Bercut suit as one of the things that could be accomplished in this equity receivership, did you not?

(Deposition of Lloyd R. Arnold.)

A. I have already said that, yes.

Q. And you discussed that with Mr. Scampini, your counsel, long before you had this meeting of August 20th, 1942? A. Yes.

Q. And it was upon Mr. Scampini's legal advice that these various steps were taken, was it not?

A. Yes.

Q. In January, 1941, was the Pacific Empire Holdings Company represented by counsel?

A. In January, 1941?

Q. Yes, at the time you made the Bercut deal?

A. No, we had no—the holding company had no counsel.

Q. At that time? A. No.

Q. What was the last time prior to January of 1941 that the company had any attorney that advised it?

A. As a counsel for the holding company, I don't believe—I don't believe we had any one after Mr. Scampini resigned. I may have gone for advice to somebody. We had this government suit pending, but that was an out-and-out—well, you might say hiring of legal counsel.

Q. Now, the Bercut transaction was entered into in January of 1941? A. That is correct.

Q. Bear that date in mind, please. During the year 1941, from January until December of 1941, did you or—strike that out. During the year that you have mentioned, from January, 1941, to the end of the year, did the Pacific Empire Holdings

(Deposition of Lloyd R. Arnold.)

Company have any more or less indebtedness than it did during the year 1942 up to the present time?

A. Well, during 1941——

Q. That is a little complicated, and I will re-frame it. Was there any change——

Mr. Scampini: Any material change.

Mr. Goodman: Q. (Continuing:) ——any material change in the amount of the indebtedness of the Pacific Empire Holdings Company from 1941 to August 20th, 1942?

A. Well, yes, there was.

Q. In what respect did that indebtedness change?

A. A general reduction of obligations, I would say.

Q. In other words, in August, of 1942, the company owed less money than it did in January, of 1941?

A. Oh, yes.

Q. And when did that decrease take place, in obligations? Was that a gradual decrease, or did it occur at any particular time?

A. Well, there was a gradual decrease of obligations—well, when we sold our bank stock there was a decrease.

Q. Well, let me put it to you this way, just in round numbers and without going into detail, approximately how much did the company owe in January of 1941?

A. In January of 1941?

Q. Yes, at the time of the deal?

(Deposition of Lloyd R. Arnold.)

A. Do you want me to include subsidiaries in that?

Q. No, just obligations of the Pacific Empire Holdings.

A. You mean to our subsidiaries—the whole thing?

Q. Yes, everything.

A. Well, *everybody* it would be—let's see—it certainly must have been up around two hundred and fifty thousand—something like that.

Q. And on August 20th, 1942, at the time you had this directors' meeting recently, about how much was the indebtedness of the company at that time?

A. About—at least a couple of hundred thousand, I'd say.

Q. So there wasn't any great, material difference, was there, in how much it owed? You might have paid off some small——

A. No, there was a difference there—that is what I am trying to figure here—because when we sold our bank stock we retired our bank loans. That was fifty thousand there——

Mr. Scampini: Wasn't that to the corporation, Pacific Empire Corp.?

Mr. Goodman: I am just talking about the Pacific Empire Holdings now.

A. Yes. I guess most of it was in the corporation—probably all of it. I would have to look that up.

(Deposition of Lloyd R. Arnold.)

Q. Well, what I am trying to get at—and correct me if I am not correct in what I say—is that the indebtedness of the Pacific Empire Holdings Company was not substantially different in August of 1942 than it was in January of 1941 at the time of the Bercut transaction?

Mr. Scampini: I will stipulate to that, because the books will show, Mr. Goodman.

Mr. Goodman: Well, I am just trying to get his recollection.

Mr. Scampini: Substantially the same—approximately.

Mr. Goodman: Q. Is that statement that Mr. Scampini made—is that, to your recollection, substantially correct, Mr. Arnold?

A. Well, I guess it is. I would have to check it.

Q. But you believe that it substantially is correct?

A. Well, my hesitancy is only because, I think—I know that we were whittling down a lot of items during that time, and of course there was accruing interest on everything else, so I suppose it ended up in a substantial reduction. I guess that is about the way I would have to figure.

Q. So there really wasn't any substantial difference in the financial condition of the Pacific Empire Holdings Company during the period from January, 1941, to August 20th, 1942?

A. Oh, there was a substantial difference in the financial condition, yes.

and L. R. Arnold, secretary-treasurer.

Q. In what way?

A. You were talking about the situation before the Pacific Empire Corporation lost its bank stock. We had a 52 or 53% interest in the Pacific Empire Corporation, and on or about this time——

Q. When did that occur?

A. We lost our corporation stock by pledge.

Mr. Scampini: What do you mean by that? Be very explicit in that respect, Mr. Arnold.

A. I beg your pardon?

Mr. Scampini: Tell what you mean when you say "corporation stock." That doesn't mean anything. Tell what happened. Give the details.

Mr. Goodman: Well, now, I am asking the questions.

Mr. Scampini: I know, but for the purpose of the record "we lost our corporation stock" is not clear.

A. Well, I am talking about it—I am familiar with it, so I probably am not expressing it right. We had Pacific Empire Corporation stock pledged with Mr. Chase, our landlord, and that was foreclosed on and taken over.

Mr. Goodman: Q. Now, that Pacific Empire Corporation stock lost value because of the fact that it lost its stock in the Pacific National Bank?

A. That is correct.

Q. And when did that occur approximately?

A. Oh, in February or March, I believe, of this year—somewhere along there.

(Deposition of Lloyd R. Arnold.)

Q. 1942? A. 1942, yes.

Q. And when did you—you are speaking now of the loss of the corporation stock—or the loss by the corporation of the stock——

A. I was speaking of the loss by the corporation of the bank stock.

Q. And when did you lose the corporation stock?

A. We lost the corporation stock, oh, sometime about thirty days ago, I guess.

Q. I see. Now, during the year 1941——

Mr. Scampini: May I interrupt, Mr. Goodman?

Mr. Goodman: Yes.

Mr. Scampini: You say “we lost the corporation stock.” What do you mean by “we”?

A. In other words, a note owing by Pacific Empire Holdings Corporation to Kohler & Chase. They demanded payment, and then they foreclosed on the collateral and took it over.

Mr. Scampini: What I mean to say, Mr. Arnold, is that the use of the word “we” is very misleading. You are not the holding company. You are just an officer. Instead of saying “we” say “Pacific Empire Holdings,” or whatever you mean by “we.”

A. Well, I will do that. I didn’t know what else to say.

Mr. Goodman: Q. Well, the Pacific Empire Holdings had—let’s see, now—it was Pacific Empire Corporation stock, the Pacific Empire Corporation, that was pledged to Kohler & Chase?

and L. R. Arnold, secretary-treasurer.

A. It was stock of the Pacific Empire Corporation that was pledged to Kohler & Chase.

Q. By Pacific Empire Holdings?

A. By Pacific Empire Holdings.

Q. To Kohler & Chase? A. That is right.

Q. And that was foreclosed, you say?

A. That was foreclosed.

Q. And when did that take place—that foreclosure? A. As I say, about thirty days ago.

Q. And that pledge was given as security for a note of the Pacific Empire Holdings to Kohler & Chase? A. That is right.

Q. Do you recall approximately how much that note was? A. The note to Kohler & Chase?

Q. Yes.

A. Well, I believe it was around thirteen thousand.

Mr. Scampini: Well, outside the record.

A. The note was subsequently reduced by payments, and I don't know to what figure; and then we—the rent has been accruing, which we didn't pay, and I think there still is around the figure of—I think somewhere around thirteen or fourteen or fifteen thousand, probably. I would have to look it up.

Mr. Goodman: Q. You don't know whether that is all represented by a note?

A. No, I don't. I would have to look it up. It is not all represented by a note.

(Deposition of Lloyd R. Arnold.)

Q. Kohler & Chase is maintaining an action, is it, against the holding company on that obligation?

A. Well, I assume it is, yes.

Q. You gave your deposition in that action?

A. Yes.

Q. Now, during the year 1941 and after the transaction with Mr. Bercut, did you at any time discuss with Mr. Maffei or with any counsel the matter of the Bercut transaction?

A. During what period again? Will you give me that?

Q. During the period from January, 1941, to the end of 1941. A. No.

Q. You regarded that as a closed transaction, did you not—the Bercut transaction?

A. Well, we hadn't thought far enough along on it.

Q. Didn't you regard it as a closed transaction?

A. At that time I did, yes.

Q. And during the year 1941, at no time did you and Mr. Maffei discuss the Bercut transaction with respect to attempting to set it aside in any way, did you?

A. We discussed it many times, but I don't think with the idea of setting it aside. We didn't feel that we had made a very good deal. I know that.

Q. Well, why didn't you feel that you had made a very good deal?

A. Well, we lost the major asset, of course, and it didn't leave us in very good condition?

(Deposition of Lloyd R. Arnold.)

Q. Let's see—the major asset of the Pacific Empire holdings was this stock in the Merchants Ice? That is right, isn't it?

A. Yes. Our whole program was built around that.

Q. And at that time you were of course the president, as you have already testified, of Merchants Ice? A. Yes.

Q. And did the stock of Merchants Ice, either the common or the preferred, to your knowledge, have any market value in January of 1941?

Mr. Scampini: We object to that as incompetent, irrelevant and immaterial.

A. It was an unlisted—pardon me?

Mr. Scampini: Go ahead and answer the question.

A. It was an unlisted stock. There wasn't much of a market. It wouldn't mean anything anyway.

Mr. Goodman: Q. Nobody was buying it or selling it—was there?

A. It was bought and sold from time to time in small lots.

Q. At or about January, 1941? A. Oh.

Q. Or just prior thereto?

A. I don't know of any sales right then. I would have to look it up. I didn't know, I mean.

Q. Well, you knew at the time you made the transaction with Mr. Bercut that there was no market for that stock, didn't you?

A. There was no market for it. I grant that.

(Deposition of Lloyd R. Arnold.)

Q. Nobody would pay anything for it? That is a fact, isn't it, Mr. Arnold?

Mr. Scampini: I object to the question as assuming something not in evidence.

Mr. Goodman: Well, the witness knows.

Mr. Scampini: Well, that is asking for the conclusion of the witness.

A. Well, what I am trying to say is this: Being an unlisted stock, there was no active market on its stock, and blocks of stock—

Mr. Goodman: Q. Well, Mr. Arnold, in January of 1941, when both companies were in desperate straits, if there was any way that you could have sold the Pacific Empire stock to receive anything in excess of, let us say, fifty cents a share, you would have investigated and looked into that, wouldn't you? As president and general manager of Pacific Empire Holdings you would, wouldn't you?

A. I naturally wanted to make the best deal possible, of course.

Q. And you would have looked into and investigated to see whether or not you could have received any substantial price for the shares of Merchants Ice?

A. We were talking about market—as to the market. Well, it would have been ridiculous for me to go on the market, because there was no market.

Q. There was no market. Well, you did make some effort, did you not, Mr. Arnold, to find some

(Deposition of Lloyd R. Arnold.)

one who would buy the stock of Merchants Ice from the Pacific Empire?

A. Well, I have already stated that, yes.

Q. Yes. And you couldn't find any one that would buy it, could you?

A. Well, I hadn't found anybody up to that time, but——

Q. Well, the reason why you couldn't find any one to buy it was because the Merchants Ice was in a hopeless financial condition at that time? Isn't that right?

Mr. Scampini: I object to it as an argumentative question, and assuming something not in evidence.

Mr. Goodman: He was president of the company.

Mr. Scampini: But your statement that it was in a hopeless condition—you don't know it was.

Mr. Goodman: I am asking the witness the question.

Mr. Scampini: Well, that is asking for his conclusion. It certainly didn't turn out to be hopeless. As soon as Mr. Peter Bercut got there, who was a competent business man, it became a very fine concern.

Mr. Goodman: Well, that is very true.

Mr. Scampini: That is only the Merchants you are talking about now—the Merchants Ice Company. I am willing to admit that Mr. Peter Bercut is a better manager than Mr. Arnold.

Mr. Goodman: Well, that is not disputed.

Mr. Scampini: Why do you ask those questions?

(Deposition of Lloyd R. Arnold.)

You know very well they are not proper cross examination.

Mr. Goodman: Will you read the last question, Mr. Reporter?

(Pending question read.)

A. I would not say that it was a hopeless condition, no. I have stated the reasons why. It was a combination of things. The future was there. I can't deny that.

Q. You stated in your direct examination the other day that you had to make this deal.

A. I cited the circumstances.

Q. Now, after the first of the year 1942 and during the first six months, let's say, up to June of 1942, did you have any discussion with Mr. Maffei during that period of time with respect to the Bercut transaction?

A. We had numerous discussions.

Q. And did you discuss at that time with Mr. Maffei, now that the Merchants Ice seemed to be doing a little better business, the idea of trying to set aside the Bercut transaction?

A. No, we often commented on how well we heard they were doing.

Q. And you didn't discuss at that time any plan for setting aside the transaction with Mr. Bercut, during the first six months of 1942?

A. The first six months of 1942?

Q. From January 1st of June 30th, 1942—that is, this year?

(Deposition of Lloyd R. Arnold.)

A. We didn't discuss any plan.

Q. When did you and Mr. Maffei first discuss between yourselves the idea of trying to set aside the Bercut transaction?

A. Well, I think a lot of our discussion took place when we were reviewing the entire situation affecting the company with counsel. We didn't know what our rights were—the holding company didn't know its rights.

Q. Then am I correct in saying that the first time that you and Mr. Maffei—now, if I am not correct, correct me—discussed the setting aside of the Bercut transaction or attempting to set it aside, was when you and Mr. Maffei first discussed it with Mr. Scampini?

A. As far as any plan concerning that, or anything else affecting the holding company, it was only discussed when we were attempting to salvage the company.

Q. Well, was the first time that you and Mr. Maffei discussed the idea of setting aside or attempting to set aside the Bercut transaction, upon the occasion when you first consulted with Mr. Scampini concerning the matter? Was that the first time that that was discussed? If it wasn't, then I want to know when you first did it?

A. Well, Mr. Maffei and I have had numerous discussions about it in the past and present, and how to save the company. While we had no plan, it would certainly have been fine for the holding

(Deposition of Lloyd R. Arnold.)

company if it would have some position in the Merchants. We had often discussed that in a general way.

Q. You had discussed that it would be a good thing if you could get back into the Merchants again?

A. We did—if we still had a good stock position in the Merchants, it would be nice; it was doing a good business.

Q. When was the first time that you and Mr. Maffei discussed about it being a good idea to get back into the Merchants Ice again?

A. Well, just as I say, we had no—in our discussions we had no definite plan to do that.

Q. Now, listen to the question, please. Read the question, please.

(Pending question read.)

A. No, as far as—we had no discussion about getting back into the Merchants Ice.

Q. Well, you said a moment ago——

A. That sounds as if we were going to move back.

Q. Then I will repeat my other question again, and let's see if we can get an answer: When was the first time that you and Mr. Maffei ever discussed the idea of trying to set aside the Merchants—the Bercut transaction, and recovering the Merchants Ice stock for the Pacific Empire Holdings Company?

A. Our first discussions along those lines were

(Deposition of Lloyd R. Arnold.)

with counsel after we were reviewing the—all matters relating to the company.

Q. So that you never had any discussion between you and Mr. Maffei concerning this matter until you first discussed it with Mr. Scampini? Is that right?

A. We mentioned about a plan—our legal rights, yes.

Q. And whose suggestion was it—yours or Mr. Maffei's—that you would consult with Mr. Scampini concerning the Bercut transaction?

A. There was no discussion between us about—maybe I didn't get that.

Mr. Goodman: Will you read the question, please, Mr. Reporter?

(Pending question read.)

A. We had no discussion about consulting with Mr. Scampini for that purpose of getting back, as you say, into the Merchants. Our whole discussions originated right here on or about this time that we received the letter from Delaware.

Q. Now, a little while ago, in answer to my questions, you told me of luncheon meetings that you and Mr. Maffei had with Mr. Scampini?

A. Yes, that is correct.

Q. At which you discussed the Bercut transaction?

A. Yes, that is correct.

Q. Now, in those meetings did you discuss the legal question with Mr. Scampini as to whether or not that Bercut transaction could be set aside?

(Deposition of Lloyd R. Arnold.)

A. There was no discussion at those meetings—there was only one or two, social getting togethers.

Q. Well, you have already told me, Mr. Arnold, that you did discuss the Bercut transaction at those luncheon meetings with Mr. Scampini.

A. Yes.

Q. That is true, is it not?

A. That is correct.

Q. All right. Now, was there any discussion in connection with the Bercut transaction at those luncheon meetings, with reference to the method by which the transaction with Bercut could be set aside?

A. I don't recall that we discussed it—any plan, no.

Q. Well, did Mr. Scampini have any suggestion to make as to what could be done in that regard, at those luncheon meetings?

A. I can only repeat that we discussed most developments, and particularly that one of the Bercut transaction, when we were telling Mr. Scampini what had more or less happened since he wasn't associated with the company.

Q. Will you please now answer my question? I will repeat it again. Did Mr. Scampini make any suggestion in those luncheon meetings as to whether or not the Bercut—whether or not and how the so-called Bercut transaction could be set aside?

Mr. Scampini: Why didn't you ask him if Mr.

(Deposition of Lloyd R. Arnold.)

Scampini expressed any opinions on it, Mr. Goodman?

Mr. Goodman: Would you read the question again, Mr. Reporter?

(Pending question read.)

A. I don't recall any discussion of a plan, at least while I was present.

Q. Well, did Mr. Maffei at that time authorize Mr. Scampini—in those luncheon meetings authorize Mr. Scampini to go ahead and investigate the matter?

A. We hadn't arranged at that time yet.

Q. Well, how did—what if anything was said by Mr. Maffei or yourself as to whether or not Mr. Scampini should look into the matter?

A. I don't recall anything like that. Our main discussions on this whole subject came up after Mr. Scampini was going to represent us on this Delaware proceeding, and then we reviewed everything, and he gave his opinion on it.

Q. Well, now, at the times that you had the luncheon meetings with Mr. Scampini, at which this Bercut transaction—

A. May I correct that "luncheon meetings"? I think we had only one or two. I am not sure.

Q. I am not trying to hold you down to that, whether you had one or two; I am not concerned with that. Referring again, now, to the luncheon meeting or meetings, whichever they were, with Mr. Scampini, did nothing happen with reference to

(Deposition of Lloyd R. Arnold.)

authorizing Mr. Scampini to proceed until you had received this letter that has been offered here in evidence, of July 16th, 1942?

A. All of our conversations were all about this same time. I think they were all prompted by that.

Q. Well, at any—at either or all of these luncheon meetings that you had between Mr. Maffei and yourself and Mr. Scampini, did Mr. Scampini say that he would investigate the matter and start any proceedings in Delaware?

A. I think in the general conversations, when we talked about the Bercut transaction and others, that he may have expressed the opinion that the corporation probably had some rights in the matter.

Q. And did Mr. Scampini in those luncheon meetings or meeting—meeting or meetings—tell you what could be done under the Delaware law?

A. Well, nothing other than what the proper steps were that we should take in order to protect the company.

Q. No, I am talking about the luncheon meetings, Mr. Arnold. A. Oh.

Q. At the luncheon meetings, before this thing——

A. Oh, no, no.

Q. (Continuing) ——he didn't advise you what could be done about the Delaware——

A. About the steps in Delaware?

Q. Yes.

A. No, the steps in Delaware were prompted by this, by these proceedings, which we were certainly advised of.

(Deposition of Lloyd R. Arnold.)

Q. Now you say that these luncheon meetings or meeting with Mr. Scampini took place maybe a month before this letter came?

A. Yes, something like that.

Q. And part of the discussion at the luncheon meetings I think you said was concerning payment of the obligation owing to Mr. Scampini?

A. That was one of the things.

Q. Did the two persons who were named in the complaint in this action as having instituted the equity proceeding in Delaware—Tanzer and Wilhelm—ever to your knowledge make any demands of any kind upon the Pacific Empire Holdings Company prior to the time that you received this letter from Mr. Wingate of July 16th, 1942?

A. No, I had no other demands that I recall.

Q. You had never heard of any claim that they had against the company? A. No——

Q. Up to the time that you received this letter from Mr. Wingate?

A. No. The only thing I could think about is that people, I assume, often assign their claims, or whatever they might have, to others, and I thought probably it might be one of our larger creditors—Mr. Chase or somebody——

Q. So up to the time that you saw the complaint in this action you didn't know who these people were, either Mrs. Wilhelm or Tanzer—Mrs. Tanzer? You had never heard the names before?

A. No.

(Deposition of Lloyd R. Arnold.)

Q. The first time you ever heard of them was when you saw their names in the complaint? Isn't that right? A. Yes.

Q. And no stockholder or creditor had ever, prior to the time that you received this letter from Wingate, advised you that he or they were going to start any equity proceeding against the corporation in Delaware?

A. We had all kinds of pressure from creditors, but we weren't advised of what action they were taking, other than Mr. Chase, who filed action against us on or about that same time.

Q. So the first time you knew about any equity proceeding in Delaware was when you received this letter from Mr. Wingate?

A. Yes, that is correct.

Q. That came out of a clear sky? Is that right?

A. Yes.

Q. You had no advance information of any kind that this proceeding was going to take place in Delaware? A. That is right.

Q. Now, do you know whether either one of these people, Mrs. Tanzer or Mrs. Wilhelm, was a creditor of the Pacific Empire Holdings?

A. I didn't know which it would be. As I said before, that group of stockholders—I had been in contact with those things before, and you never know who it is—a creditor. It could be assigned to somebody else, I assume. It might have been Chase or any one.

(Deposition of Lloyd R. Arnold.)

Q. Now, do you recall in 1938 the purchase by the Pacific Empire Holdings of some shares of Merchants Ice & Cold stock?

A. We purchased small amounts from time to time. I don't—in 1938, you say?

Q. Yes. A. I don't know.

Q. You don't recall that, by way of your recollection?

A. No. It was probably some small block—no, wait a minute—wait a minute.

Q. Well, I will refresh your recollection in this way: Do you remember that on February 25th—on or about February 25th, 1938, the Pacific Empire purchased 5516 $\frac{2}{3}$ shares of the preferred stock of Merchants for the purchase price of \$7,604.68?

A. Oh, I know what that was, yes—I think I know the block without referring to it—I think that is when Mr. Sherman, who was then president of the Merchants, was carrying some stock at the Anglo, and Louis Sutter, a vice-president of the Anglo—I think that was his title—he was on the Board of the Merchants also, who were banking at the Anglo, and he wanted to sell his stock at the same time, and he wanted to clean up the obligations of Mr. Sherman. I think we were guarantors on that, so we bought his, including the other block, and consolidated them and issued our note on it.

Q. And do you remember what the relation was between the price that you paid for that stock and the market for the stock at that time?

(Deposition of Lloyd R. Arnold.)

A. The stock that Mr. Sherman had was somewhere around the market, I think, that he picked up. The stock of Mr. Sutter—in fact, it was after a directors' meeting when he asked me if we wouldn't buy his stock, and we arrived at a price there. I can't think now exactly what it was, and I can't remember whether it was preferred or common either.

Q. Well, preferred was one twenty-five a share.

A. It was common or preferred.

Q. I am talking about preferred.

A. Preferred?

Q. Yes. It was around a dollar and a quarter a share in February of 1938.

A. Yes. Well, preferred stock, we paid anywhere up to as high as two and a half, I think, for.

Q. In 1938? A. Well, I don't know.

Q. Well, do you know what common stock was selling for at that time?

A. Well, common stock sold anywhere from—

Q. In 1938, I mean.

A. I would have to check on that.

Q. You haven't any present recollection of that?

A. Well, I would just say anywhere up to seventy-five or a dollar, or something like that.

Q. For the common stock? A. Common.

Q. In January of 1941 the executive committee of the Pacific Empire Holdings Company consisted of, you say, Mr. Bercut, yourself, and Mr. Maffei?

A. Yes, the last committee was that.

Q. And that committee was the committee that

(Deposition of Lloyd R. Arnold.)

was appointed by the board of directors following the annual meeting of January, 1940—or February, 1940? Isn't that right?

A. It was always—the committee was appointed at the same time the officers were at each organization meeting.

Q. In order to get the record clear, the executive committee appointed by the board of directors in their meeting following the annual meeting of February, 1940, consisted of yourself, Mr. Maffei, and Mr. Bercut?

A. Yes, that is correct.

Q. Now, you said that at or about the time of the confirmation of the transaction with Mr. Bercut you received his resignation as a director?

A. That is correct.

Q. Now, then, after the resignation of Mr. Bercut was received by you, before the transaction was finally closed, there were then left on the executive committee yourself and Mr. Maffei? Isn't that correct?

A. If that were the case, that would be it, yes.

Mr. Scampini: That of course is assuming—that is asking for a conclusion of law, as to when——

Mr. Goodman: Well, of course that may be so.

Q. Now, I want to call your attention to the section of Article VII of the by-laws which refers to the powers of the executive committee, to which Mr. Scampini referred a short time ago, and read it to you and ask you a question concerning it:

“Any executive committee appointed by the board

(Deposition of Lloyd R. Arnold.)

of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened."

A. Yes.

Q. Now, it is a fact, is it not, that you frequently made, entered into or concluded business transactions by the executive committee without formerly convening a meeting of the committee? Isn't that true?

A. There were occasions like that, yes.

Q. And if the committee actually signed some document or entered into such a transaction—or entered into a business transaction whereby all of the members of the committee signed the documents having to do with the transaction, you wouldn't hold a meeting of the executive committee besides that, because you would consider that that was the action of the committee, wouldn't you? I mean in the normal course of your conduct of the affairs of this corporation. That is a correct statement, isn't it? Or have I made that too complex?

A. Well, there is just one part of it I missed near the first; I didn't quite get your construction of it. If you will just repeat the first part of it so I can get it.

(Pending question read.)

and L. R. Arnold, secretary-treasurer.

Q. Is that a little too complicated to answer, or do you get what I am driving at?

A. Well, I think I get what you mean there.

Q. Well, if it is causing you some uncertainty in answering it, let me reframe it this way: In lieu of holding a formal meeting of the executive committee, if you actually consummated a transaction that required the signatures of the executive committee, that would be sufficient, wouldn't it, without holding a meeting of the committee itself besides signing the documents that would be involved?

A. No.

Q. Did you frequently do that?

A. Well, I would perform duties that I thought were within my own authority. If I thought it necessitated a meeting——

Q. I am not talking about you alone, Mr. Arnold.

A. No—any officer of the company.

Q. Well, you and Mr. Maffei and Mr. Bercut were the executive committee.

A. That is right.

Q. For a certain period of time.

A. That is right.

Q. Now, if you entered into a transaction in which all of you signed——

A. Yes.

Q. (Continuing): ——you would not call a meeting of the executive committee besides, would you?

A. No. I didn't get the question. No, that is correct.

Mr. Scampini: You mean by "signed"—you mean approved the minutes, or something?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: Q. Well, I am not speaking of the minutes. I am talking about a business transaction involving the signing of some documents. If you and the other members of the executive committee actually signed the documents which had to do with the transaction, you wouldn't need to call the executive committee, because you had already signed the documents that were involved in the transaction. That is what I am trying to point out to you. Have I made that clear?

A. Yes, I see that now.

Q. You did that very often, didn't you?

A. Well, if every member was on an agreement or transaction, that was also a member of the committee, well, I don't think I would call a special meeting if we were all familiar with the transaction.

Q. Yes. Now, let me ask you just a couple more questions there, and then we will take an adjournment. Did you discuss your testimony on this deposition with Mr. Scampini before the commencement of the deposition?

A. No, there was no discussion of it; it was just——

Q. Did you go over what your testimony was to be or what subject matters were to be covered, before the deposition commenced? A. No.

Q. At no time?

A. No, it wasn't necessary. If the subject ever came up in discussion, I would say the same thing, but——

and L. R. Arnold, secretary-treasurer.

Q. Well, I know, but irrespective of whether it was unnecessary or not, in fact, did you go over your testimony with Mr. Scampini before the deposition? A. No, I did not.

Q. And between the recess—between the hearing on last Thursday and this morning's session, did you discuss your testimony with Mr. Scampini at all?

A. No, I haven't talked with Mr. Scampini since the day I left here, until I came in this morning.

Q. And you didn't discuss your testimony with him? A. No, I didn't.

Mr. Goodman: Suppose we recess for lunch?

(Thereupon an adjournment was taken until 1:15 o'clock P. M., Saturday, September 19th, 1942, and by consent of counsel to be resumed at the same place.)

Saturday, September 19, 1942, 1:15 P. M.

LLOYD R. ARNOLD,

recalled as a witness, having been previously sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Cross Examination

(Resumed)

Mr. Goodman: Shall we resume now?

Mr. Scampini: Yes.

Mr. Goodman: Q. Mr. Arnold, on Thursday you said that—you mentioned the pledge agreement with

(Deposition of Lloyd R. Arnold.)

Mr. McInerney, and Mr. Scampini showed you the so-called pledge agreement and it was identified, whereby certain shares of Merchants Ice & Cold Storage Company were pledged. A. Yes.

Q. To secure a \$50,000.00 obligation. Now, do you recall whether or not that pledge was or was not cleared up in some manner at a later date?

A. That was a pledge of the stock to McInerney. I believe he had a lien on the bank stock too. Well, we—he was later paid off, I believe, and we re-financed that through the bank.

Q. That is what I am trying to get at. It is a fact, is it not, that some later agreement was made with McInerney, by which your obligation to him that was secured by the stock was satisfied by some different type of agreement with him, and that thereupon the shares of stock were pledged to the Pacific National Bank and to the Anglo Bank for loans—— A. The Pacific National Bank.

Q. The Pacific National Bank, I mean.

A. Yes.

Q. And those shares that were the subject matter of this agreement with Mr. Bercut were actually still in pledge at the bank at the time of the making of the agreement with Mr. Bercut, and had to be released, did they not?

A. Yes, that is correct.

Q. The shares of stock of the Merchants, the subject of this Bercut transaction, as we call it, were never at any time in the possession of the

(Deposition of Lloyd R. Arnold.)

Pacific Empire Corporation, were they, in any way, so far as you know?

A. Well, they were pledged to the Pacific Empire Corporation.

Q. Yes, but wasn't that lien of its subsequent to the lien of Mr. McInerney under the pledge agreement?

A. Subsequent to McInerney's?

Q. I mean subordinate to McInerney's.

A. Well, now, I don't know whether they were subordinate or not, but I know this—I will try to answer. When the shares—whether it was subsequent or subordinate to that, I will have to look that up; but when they were in the Pacific National Bank they were behind the corporation note, which I believe was a larger one, and the holding company had a note; they were guarantors on each. I think that was the way it worked.

Q. They both had notes in the bank then?

A. The smaller note I believe was the holding company, and the larger one was the corporation. I believe that is the way it worked.

Q. But at any rate the sum and substance of that was that when the Bercut transaction went through, the arrangements were made with the bank to release the stock that was pledged, and a payment was made to the bank on those obligations?

A. Yes, I went to the bank and obtained the release, yes.

Q. So far as you know, did the Pacific Empire Corporation ever at any time have possession of these shares of Merchants Ice?

(Deposition of Lloyd R. Arnold.)

A. Well, they were pledged. They must have had possession.

Q. Did they actually in some manner have actual possession of the certificates of stock, if you know?

A. Well, I don't know without looking up. I mean that——

Q. Well, how would you find that out?

A. I would have to refer—to get the continuity of our pledges there, I would have to refer to the contract file.

Q. Well, who were the officers of Pacific Empire Corporation?

A. Mr. Maffei was president and Mr. Heer was secretary-treasurer.

Q. Did you have any separate receptacle or box——

A. Yes, we had separate files.

Q. Well, now, how would you know—where would you look to find out whether or not the Pacific Empire Corporation ever had possession of these shares?

A. I would have to look in our collateral folders and our contract file to refresh my memory on that, and then I could probably answer it a little more intelligently.

Q. Without doing that, you can't answer?

A. No, I couldn't answer that now. I would only say that I assume they had possession of it, naturally.

Q. Do you recall whether or not—if it is not a fact that simultaneously with the release of Mr.

(Deposition of Lloyd R. Arnold.)

McInerney's claim or pledge, and in order to accomplish that, whether or not it isn't a fact that the shares were simultaneously pledged with the Pacific National Bank, and in that way the funds were obtained by which the McInerney claim was satisfied and the release from him obtained?

A. Well, yes, that is correct—that is correct.

Q. Now, I believe you testified on Thursday that during the time of your discussions with Mr. Bercut with respect to fixing a price on it, making a deal in connection with the sale of these Merchants shares, that you exchanged opinions with Mr. Heer, who was the secretary—assistant secretary, I believe——

A. He is treasurer, yes.

Q. Treasurer? A. Yes.

Q. Now, did you at the time also exchange opinions with Mr. Webb Richards concerning the matter of this transaction with Mr. Bercut?

A. No, I don't believe I did.

Q. You never discussed it with him at all?

A. I never discussed any details of the transaction with Mr. Richards, no.

Q. Didn't you tell Mr. Richards that you were negotiating with Mr. Bercut?

A. Mr. Richards undoubtedly knew that there were negotiations going on, yes; but as to discussing any details with him, no.

Q. How about Mr. Ryerson? He was an officer of one of your subsidiary companies, wasn't he?

A. Yes, that is correct.

(Deposition of Lloyd R. Arnold.)

Q. Did he know about the pending discussions with Mr. Bercut?

A. He may have known through a conversation with myself that there were negotiations going on, that we hoped would help our position; but as to any details or who it was, I doubt if he knew.

Q. In other words, you didn't discuss with either Mr. Richards or Mr. Ryerson the details of this transaction, any more than you did any other transaction that the officers of the corporation handled? Isn't that right? That is, handled as the executive manager, as it were, of the affairs of the company?

A. Well, we have had an awful lot of transactions where they have been passed upon by the Board, of course, as the minutes show. In this instance, of course, Mr. Ryerson was in Bakersfield, and he had only been a director for about a year, I think.

Q. Now, there were many instances, I find in connection with an examination of the minute books, where you had transactions and consummated them and then reported them to the executive committee or board of directors months later.

A. That happened in some instances.

Q. And so it wasn't anything unusual, was it, that you conducted a business transaction for the corporation without having a prior authorization from the board of directors or the executive committee?

A. Well, on any major transaction, acted on by

and L. R. Arnold, secretary-treasurer.

the executive committee, we generally discussed it with the Board or immediately reported to them.

Q. Now, this was a major transaction, wasn't it, with Mr. Bercut? A. Yes, it was.

Q. Now, did you conceal the fact that you were engaged in this major transaction with Mr. Bercut from the other directors of the company?

A. No, we didn't conceal it.

Q. Did you deliberately and with plan aforethought enter into this transaction with Mr. Bercut with the idea in mind of not advising the board of directors concerning the transaction? A. No.

Q. Well, why was it, then, that you made the transaction at that time without getting, let us say, the prior authority of the board of directors?

A. The only answer I can give to that is that the conditions and everything were becoming quite hectic at the time, and in our opinion some sort of a transaction should be worked out that would be profitable to both companies.

Q. Now, these discussions with Mr. Bercut extended over a period of about sixty days, I think you said? A. I believe that was it.

Q. Now, during all that period of time you and Mr. Maffei did not consult, outside of Mr. Heer, with any of the other directors concerning this matter?

A. No, we worked it out, what we thought was in our best interests. We did it.

Q. Now, did you intend to ask the approval of the board of directors?

(Deposition of Lloyd R. Arnold.)

A. Well, we certainly were not concealing it. I presume we did.

Q. You didn't have in mind the fact that you weren't—I will put it this way: Did you intend deliberately not to present this matter to the board of directors? A. No.

Q. Neither you nor Mr. Maffei?

A. I certainly don't believe Mr. Maffei did. I know I didn't.

Q. And you didn't?

A. I didn't do it with any deliberate intent and purpose, no.

Q. And did you act, in making this transaction with Mr. Bercut, in the utmost of good faith so far as the affairs—so far as your representation of the holding company was concerned?

Mr. Scampini: Isn't that asking for the conclusion of the witness?

Mr. Goodman: Well, it might.

A. I certainly believed I was acting in good faith. There was no secret.

Q. And you felt that you were doing the best job that you could for the holding company?

A. I had no other interest but doing the best job I could, whatever it was.

Q. And that is what you felt that you were doing at the time, Mr. Arnold?

A. As the circumstances existed, I could only act along what I thought was the best interests of the corporation.

(Deposition of Lloyd R. Arnold.)

Q. And from your own knowledge, do you think that that was the view—do you know, rather, that that was the view that Mr. Maffei held at the time, as a result of your discussions with Mr. Maffei?

A. Well, yes.

Q. Now, Mr. Scampini asked you this morning whether Mr. Bercut had asked you to call a meeting of the board of directors with respect to this matter.

A. Yes.

Q. And you said he did not.

A. No, not that I recall, I believe I said.

Q. Did you have any discussion with Mr. Bercut with respect to the holding of a board of directors' meeting of the company?

A. No, I believe I have already answered that; I don't remember any such discussion.

Q. You never had any such discussion?

A. No, I don't recall.

Q. Did Mr. Bercut make any comment upon the matter to you at all as to whether there should be a directors' meeting?

A. Well, I don't recall any such conversation.

Q. Who prepared the agreement of January 8th, 1941—the contract?

A. That letter of agreement was—I am sure I dictated that. I think I dictated that right in my own office.

Q. And after you had prepared it, you signed it as the secretary, did you not?

A. As secretary, yes.

(Deposition of Lloyd R. Arnold.)

Q. And Mr. Maffei signed it as the president?

A. That is correct.

Q. And you put on the corporate seal, didn't you?

A. I did.

Q. And then did you deliver it personally to Mr. Bercut, or did you mail it to him, do you recall?

A. No, I delivered it to Mr. Bercut.

Q. Personally?

A. I mean right in our office there.

Q. Right in your office?

A. Yes. I don't think I went over to his office. It was right there.

Q. Now, from the time of that agreement of January 8th, 1941, to August 20th, 1942, I believe you stated that there were no directors' meetings of the company ever held?

A. That is correct.

Q. And you continued during that period of time from January 8th, 1941, up to August 20th, 1942, to act as the secretary and manager of the business affairs of the company, did you not?

A. I continued in the same capacity.

Q. Yes. And you continued, whenever it was necessary, to consult with Mr. Maffei, the president of the company?

A. Naturally.

Q. You had discussions with him?

A. Yes, naturally.

Q. Did you consult with the counsel for the— with any counsel for the company at the time you entered into the agreement of January 8th, 1941?

A. No, I did not. It ended up in purely a sale, —that is all.

(Deposition of Lloyd R. Arnold.)

Q. Are your relations with Mr. Maffei at the present time harmonious?

A. Oh, yes indeed.

Q. There is no conflict between you?

A. None whatsoever.

Q. Have any threats been made to you with respect to this transaction? A. Threats?

Q. Yes, against you with respect to your testifying on behalf of the plaintiffs in this action?

A. No, none whatsoever.

Q. None whatsoever?

A. No, none whatsoever.

Q. At the time of the transaction of January 8th, 1941, did you intend—did you have an honest, good faith intention, in executing the agreement of January 8th, 1941, to transfer the corporation's shares for the consideration named therein to Ber-cut? A. I mostly certainly did.

Q. And did you consider at that time, as a trustee and officer of the corporation, that the deal was in all respects fair and proper?

A. I believe I have answered that before.

Q. Well, did you?

A. I certainly felt that it was fair under the circumstances that existed then, yes.

Q. And did you feel that you were making a proper and good faith transaction on the part of the company that you represented?

A. I was doing the very best I could.

(Deposition of Lloyd R. Arnold.)

Q. Just answer it "Yes" or "No." Just read it again, Mr. Reporter.

(Pending question read.)

A. Oh, yes.

Q. Did you receive any consideration from any one for making the transaction, other than the consideration that is recited in that agreement of January 8th, 1941?

A. Most certainly and positively not.

Q. And did you receive any promises of any kind?

A. None whatsoever.

Q. From any one, to give you any consideration?

A. Not one fraction of a cent.

Q. So far as you know, did Mr. Maffei receive any such consideration?

A. So far as I know, he most certainly didn't. Whether I knew or not, he didn't.

Q. And from your conversations and discussions with Mr. Maffei, would you say that at the time this transaction was entered into he believed that the transaction was entirely fair and proper?

A. He most certainly believed, as I did, that it was fair under the circumstances. We weren't happy over it, naturally.

Q. Did you enter into this transaction for and on behalf of the corporation with Mr. Bercut because of any compulsion on the part of Mr. Bercut?

A. I have already stated that I probably initiated the discussions. The only friendly contact that we had that was close to the picture was Mr. Bercut, and that is why I went to him.

(Deposition of Lloyd R. Arnold.)

Q. Because of the fact—I will put it this way: Is it a fair statement to say that because of the relationship which existed between you and Mr. Maffei and Mr. Bercut as a result of your connections in the two companies, and because of his standing in the business world and financial ability, that this transaction was consummated?

A. I will try to qualify the answer considerably, that, as I have said before, Mr. Bercut represented certain things that we didn't have—financial ability and credit.

Q. And there was no place else that you could go to, so far as you could see at that time, to get the means whereby you could keep these companies going? Is that right?

A. When we had reached that point, without just shopping around, as I said, we went to some one who was connected with us and was friendly and had the things that I have just mentioned. We were trying to find a solution of our problems at the same time—both problems.

Q. Now, it is stated in the complaint in this case that the Pacific Empire Holdings Company has aggregate liabilities, at the time of the filing of the complaint, in excess of \$250,000.00. Now, who are the chief creditors of the holding company?

A. Well, the chief creditors of the holding company are the Pacific Empire Corporation—that's the largest one; that is some \$160,000.00 or so. There is also about \$70,000.00 owing to myself as liquidating agent of the City National Bank.

(Deposition of Lloyd R. Arnold.)

Q. You mean that there is an indebtedness to the City National Bank? A. Liquidating.

Q. And you have been liquidating that company? A. Yes.

Q. In your official capacity as liquidating agent of the City National Bank there were some moneys owing you—is that it? A. That is right.

Q. And who else?

A. Well, Edward Molkenbuhr, an attorney, \$2400.00 or a couple of thousand, or something like that; and Kohler & Chase; Ellis & Hubner,—

Q. The attorneys?

A. The attorneys. The Corporation Trust Company a couple of thousand dollars; and miscellaneous small items and trade credits, I guess around a thousand dollars or so; Mr. Scampini four or five hundred dollars.

Q. Well, you haven't got many in regard to the number, then. It is the large amounts, is it?

A. It is the large amounts.

Mr. Scampini: The California Pacific Service—do you remember that?

A. Oh, I beg your pardon. California Pacific Service, yes.

Mr. Goodman: Q. What company is that?

A. That is the laundry company.

Q. The laundry company?

A. That is small—fifteen hundred dollars, somewhere along there.

Q. And there are some small miscellaneous trade creditors?

(Deposition of Lloyd R. Arnold.)

A. Yes, about a thousand dollars—something like that.

Q. Scattered around here in San Francisco?

A. Yes, that is local—all small.

Q. Telephone Company?

A. Well, it is still owing, I guess.

Mr. Scampini: See if that will refresh your memory. (Handing paper to the witness.)

A. Well, I think I have just about got them now. Yes, eleven hundred in the Pacific National Bank; thirty-eight hundred to Henry Bercut.

Mr. Goodman: Q. Henry Bercut? A. Yes.

Q. What was that?

Mr. Scampini: Will you excuse me a moment?

(Short recess.)

Mr. Goodman: Q. Any other substantial sums?

A. About \$600.00 worth of franchise taxes; Merchants Ice & Cold Storage Company, twenty-five thousand.

Q. Is that a list of the creditors of the company there?

A. Well, that is not exactly—it is just about a list, yes. The smaller ones are consolidated on here.

Mr. Goodman: Is there any objection to having that attached to the deposition?

Mr. Scampini: No.

Mr. Goodman: Well, then, let this be marked as an exhibit, this document which the witness has just referred to—let it be marked for identification.

(Said document marked “‘Defendants’ Exhibit for identification.’”)

(Deposition of Lloyd R. Arnold.)

Q. Now, you stated in your direct examination that when you originally—when you started the discussions with Mr. Bercut, that you had at first in mind that you would sell only a part interest of the holding company in the Merchants stock?

A. That is correct.

Q. And keep a minority interest?

A. That is correct.

Q. And that subsequently that idea was abandoned, when you decided to sell all of the stock, when you finally arrived at the price of \$35,000.00. Now, you did reserve, however, the right to retain a minority interest in the stock, did you not?

A. A right to retain?

Q. Yes. Didn't you include in the agreement for that purpose an option to repurchase within five years 20,000 shares—within two years 20,000 shares at 50¢ a share?

A. That was somewhat different from our original plan. After we arrived at the conclusion of the deal, we got the option to buy 20,000 shares, which would be 50¢ a share, yes. That wasn't the original plan, of course.

Q. Yes. So that you could have retained the minority interest by exercising that option at any time within two years?

A. If we were able to exercise it, yes, that is correct.

Q. It is the same thing in the long run as reducing the price and selling a smaller amount of stock arithmetically, isn't it?

A. Well—

(Deposition of Lloyd R. Arnold.)

A. Yes, about a thousand dollars—something like that.

Q. Scattered around here in San Francisco?

A. Yes, that is local—all small.

Q. Telephone Company?

A. Well, it is still owing, I guess.

Mr. Scampini: See if that will refresh your memory. (Handing paper to the witness.)

A. Well, I think I have just about got them now. Yes, eleven hundred in the Pacific National Bank; thirty-eight hundred to Henry Bercut.

Mr. Goodman: Q. Henry Bercut? A. Yes.

Q. What was that?

Mr. Scampini: Will you excuse me a moment?

(Short recess.)

Mr. Goodman: Q. Any other substantial sums?

A. About \$600.00 worth of franchise taxes; Merchants Ice & Cold Storage Company, twenty-five thousand.

Q. Is that a list of the creditors of the company there?

A. Well, that is not exactly—it is just about a list, yes. The smaller ones are consolidated on here.

Mr. Goodman: Is there any objection to having that attached to the deposition?

Mr. Scampini: No.

Mr. Goodman: Well, then, let this be marked as an exhibit, this document which the witness has just referred to—let it be marked for identification.

(Said document marked “Defendants’ Exhibit for identification.”)

(Deposition of Lloyd R. Arnold.)

Q. Now, you stated in your direct examination that when you originally—when you started the discussions with Mr. Bercut, that you had at first in mind that you would sell only a part interest of the holding company in the Merchants stock?

A. That is correct.

Q. And keep a minority interest?

A. That is correct.

Q. And that subsequently that idea was abandoned, when you decided to sell all of the stock, when you finally arrived at the price of \$35,000.00. Now, you did reserve, however, the right to retain a minority interest in the stock, did you not?

A. A right to retain?

Q. Yes. Didn't you include in the agreement for that purpose an option to repurchase within five years 20,000 shares—within two years 20,000 shares at 50¢ a share?

A. That was somewhat different from our original plan. After we arrived at the conclusion of the deal, we got the option to buy 20,000 shares, which would be 50¢ a share, yes. That wasn't the original plan, of course.

Q. Yes. So that you could have retained the minority interest by exercising that option at any time within two years?

A. If we were able to exercise it, yes, that is correct.

Q. It is the same thing in the long run as reducing the price and selling a smaller amount of stock arithmetically, isn't it?

A. Well—

(Deposition of Lloyd R. Arnold.)

Q. In other words, it would be the same thing as if, instead of selling 78,000 shares of stock, you were selling 58,000 shares of stock for \$10,000.00 less?

A. Well, if we were positive of being able to exercise it. That is the difference, of course.

Q. Well, I am only asking you this question in connection with your statement that you wanted to retain a minority interest.

A. Yes, that is correct.

Q. Now, at the time of the—strike that out. In your testimony on Thursday you stated that you first—you started with the figure of \$50,000.00 in discussing the matter with Mr. Bercut, and then on further examination this morning by Mr. Scampini you said that you had in mind—I think that was the words you used—\$75,000.00 to start with. Did you ever discuss the figure of \$75,000.00 with Mr. Bercut?

A. I thought we started at seventy-five—fifty or seventy-five thousand dollars.

Q. Well, as I said, in your direct examination on Thursday you started with \$50,000.00, and the first time that the figure \$75,000.00 was mentioned was in the examination this morning. Now, I would like for you to clear that up and advise me whether or not you ever discussed with Mr. Bercut any figure higher than \$50,000.00—irrespective of what you and Mr. Maffei may have had in mind.

A. Yes. Regardless of what I said—in our first

(Deposition of Lloyd R. Arnold.) -

discussion that was my thought, and we started out with seventy-five.

Q. Are you sure about that?

A. I know that was the basis I was using in discussing it with Mr. Gaither here. He was trying to interest some one. I thought we started out at—now, I can't—

Q. Well, are you sure?

A. Well, I have—

Q. Are you positive that that figure was the figure that you started out the negotiations with Mr. Bercut?

A. I think the first time that we started to talk, which was very casual, it was more or less to get Mr. Bercut's interest—I thought I discussed seventy-five thousand.

Q. Well, then, if you stated in the examination on Thursday that the starting figure was \$50,000.00, are you desirous of changing that, or is your recollection just not clear on it?

A. I didn't mean to change it—either way. That is why I began this that way. If I stated that as a definite statement, that it was fifty—I am trying to refresh my memory. I had had conversations over here at the bank at around seventy-five thousand, and I thought I probably started out the same way with Mr. Bercut. Now, I can't—

Q. At the time of the negotiations with Mr. Bercut—I will strike that out. You spoke of a lapse in the negotiations with Mr. Bercut.

(Deposition of Lloyd R. Arnold.)

A. Yes.

Q. Do you recall? A. Yes, I do.

Q. And correct me if I am incorrect in paraphrasing your statement—— A. Yes.

Q. (Continuing:) ——you stated that Mr. Bercut abandoned or quit the negotiations and went away, and then they were resumed?

A. Well, I don't believe that I said that he abandoned them, but he went away at the time on some vacation trip, I believe.

Q. Well, it was some fact, it was some matter that came up that you discussed that caused him to say he wanted to look into it further? Wasn't there something to that effect?

A. Well, I think what you refer to is when he came back and we had some more meetings, and then he expressed that he was—well, he practically turned it down.

Q. Yes. Now, what was the factor that caused that?

A. Well, the factor that caused that, that created some uncertainty, was a loss which we hadn't realized, but it was threatened. Now, I mean the Merchants Ice & Cold Storage Company.

Q. What loss?

A. One of the customers—what they called Bennett & Layton; they were customers of the Merchants.

Q. Is what you are referring to there the following, namely, that the Bank of America——

A. Yes, that is it.

(Deposition of Lloyd R. Arnold.)

Q. (Continuing:) —was asserting a claim of some forty thousand dollars for collusion——

A. Releasing.

Q. (Continuing:) —in the abstraction and releasing of butter——

A. That is right.

Q. (Continuing:) —upon which the bank claimed to have warehouse receipts?

A. That is right.

Q. And when that matter was called to the attention of Mr. Bercut, he said that he didn't want to go through with it until he went into it further, or something of that sort?

A. Well, he wanted to go into it farther, yes.

Q. So that at the time of the consummation of the transaction with Mr. Bercut, in addition to the other matters that you have referred to with respect to the financial condition of the Merchants Ice, there was a pending claim of some forty thousand dollars on the part of the Bank of America, wasn't there?

A. That was on account of this collusion between the employees of Merchants and Bennett & Layton. The butter was removed without a release.

Q. By Bennett & Layton? A. Yes.

Q. Now, besides that, another matter that was pressing was the claim of the Gas & Electric Company for unpaid bills and their threat to cut off the gas and electricity; and likewise in the case of the Telephone Company?

A. Well, the Power Company wasn't anything new; I mean that I had that trouble all the time I had been down there.

and L. R. Arnold, secretary-treasurer.

Q. And wasn't the Telephone Company pressing too for a payment of their bill, and threatened to cut off service at that time?

A. Well, now, I don't recall about the Telephone Company, but I do about the Power Company. When I went into the Merchants, it was away up to a pretty large figure, and we cut it down to less than half, I guess, but then we were still having trouble with it—a lot of trouble.

Q. Wasn't it urged at one of the directors' meetings of the Merchants Ice at or about the time of your negotiations with Mr. Bercut, by some of the directors, that Mr. Bercut be asked to take over the leadership of the Merchants Ice & Cold Storage Company?

A. Well, not some of the directors. One director asked that question—made that suggestion. That is correct, yes.

Q. Was there any discussion in one of the meetings——

A. Pardon?

Q. Was there any discussion in one of the meetings of the Merchants Ice—directors' meetings of the Merchants Ice?

A. Well, this director made the statement or suggestion before the Board, while the Board was in session. The directors commented on it, but it was—well, it wasn't in any way acted upon. I think Mr. Bercut declined at the time. I don't know. There was nothing formal about it.

Q. Did you consider it—strike that out. At the

(Deposition of Lloyd R. Arnold.)

time that you concluded the transaction with Mr. Bercut did you have in mind calling a directors' meeting of the holding company?

A. I may have had it in mind; I don't know, but——

Q. Well, is there any reason that you didn't call a meeting of the directors?

A. I couldn't give you any real reason why we didn't, no.

Q. I mean you didn't have any plan in mind for not calling a meeting, did you?

A. No. We certainly had no plan. We weren't going to do that.

Q. Now, in addition to the matters that I have asked you about as to the financial condition of the Merchants Ice at the time of the transaction with Mr. Bercut, there was another matter that was very pressing, too, wasn't there? Wasn't there a substantial overdraft in the bank account?

A. Well, not a substantial overdraft. There was—I think the only time that we were overdrawn at the bank was—I will try to explain it in this way: In other words, the legal borrowing limit with the bank, because of our other loan, was cut down, and we had operated by using the medium of trade acceptances upon concerns whom we could obtain them from, to make up our direct borrowings, and then discounting those at the bank, and then we arranged for some outside financing with a finance company here that was friendly to the bank. We

(Deposition of Lloyd R. Arnold.)

had no way of keeping down below their limits, and at one time we had to—we were right up to the limit, and instead of loaning they carried the overdraft; in other words, we always had that ceiling that we had to keep under.

Q. Did you know as a matter of fact that there was an overdraft of approximately \$8,000.00 at the time of the conclusion of this transaction on January 8th, 1941, with Mr. Bercut?

A. I didn't think it was that large. I thought it was three or four thousand dollars. This is on a particular day that I recall; it happened to be a payroll day, too.

Q. It was many, many years since there had ever been a dividend on the preferred stock of the Merchants? A. Yes, many years.

Q. How many years?

A. Well, I think the records show it was since 1927—yes, 1927, I think was the date. It was a cumulative stock—preferred stock.

Q. Were there many stockholders of the Pacific Empire Holdings Company?

A. Oh, I'd say somewhere about—somewhere about 8,000, I guess.

Q. And who sold that? Did you have an underwriter that sold that stock?

A. Well, I don't think you would call it an underwriter. All the stock was sold by a brokerage firm.

Q. What was the name of the brokerage firm?

(Deposition of Lloyd R. Arnold.)

A. That was Frederick Vincent & Company. That was before my time.

Q. At the time of your negotiations with Mr. Bercut, aside from Mr. Gaither of the bank—of the Pacific National Bank—can you name any other individual, firm or corporation whom you had in mind or to whom you could have gone in order to dispose of the stock of the Merchants Ice and get the new management for it?

A. I had no one in mind that I knew we could definitely do that, no. Is that your question?

Q. After the transaction was consummated with Mr. Bercut—strike that out. I will reframe it this way: After the consummation of the transaction with Mr. Bercut, did you ever discuss the transaction with Mr. Webb Richards, one of the directors?

A. I discussed it with Mr. Richards, that it was—that the deal was—that we had been working on was concluded. I don't believe that I ever told him the details of it.

Q. Did you have any reason for not telling him the details?

A. No reason, other than the fact that we didn't like to tell the world that we had lost our main asset, you might say.

Q. Well, he was a director of the company?

A. He was a director, yes. As I have stated before, he knew that there were negotiations going on.

Q. And he knew that the stock had been sold, didn't he, Mr. Arnold? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. Is that true in the case of Mr. Ryerson, too?

A. I don't believe that either of them knew that all the stock was sold, no.

Q. Well, they knew of the transaction with Mr. Bercut?

A. They knew that the transaction that we were negotiating had been concluded, yes.

Q. And how about the gentleman from down across the bay, the farmer Giachino?

A. Giachino—I don't believe that I have had any conversation with him at all since that time.

Q. How soon after the consummation of the transaction did both Ryerson and Webb Richards know that the deal had been consummated? Very shortly thereafter?

A. I will have to answer that this way: That we were trying to get the Frostcraft Corporation going, and needed capital. We had been drawing pretty heavily on the laundry, and I think the laundry wanted some extra cash, and I had told them that we were working on a transaction that we hoped—if it worked out, why, it would do the things that we were trying to do. That was the same as I have mentioned here.

Q. Now, the company owed—the holding company owed some money to the Merchants Ice at the time of this transaction, did they not?

A. That is correct.

Q. You didn't quite answer my question, Mr. Arnold, as to how soon after the transaction you

(Deposition of Lloyd R. Arnold.)

informed Ryerson and Webb Richards that the deal had been consummated.

A. Well, I don't know exactly. I know that we—I must have told Mr. Richards reasonably soon thereafter—I can't tell you when; but Mr. Ryerson was away, and I probably didn't tell him until next time I saw him.

Q. Well, in either or both events, is it fair to say that it was within a month or two afterwards, at the latest?

A. Oh, I would say a couple of months probably, yes.

Q. Did any director of the company ever request a meeting of the board of directors for the purpose of taking any action with respect to the Bercut transaction?

A. Not that I know of—at least not to me.

Q. Not to you. Now, what is your best knowledge as to the market for the Merchants Ice & Cold Storage Company preferred stock at the time of this transaction?

A. The best price—you mean market price?

Q. Market price.

A. The only price that I know would be a small lot price with unlisted brokers, or a broker specializing in unlisted securities. I guess the preferred stock—I have seen it as high as two and a half, two seventy-five.

Q. No, I mean in January, 1941.

A. Well, that would be according to whatever

and L. R. Arnold, secretary-treasurer.

the last sale was around then. I am frank to say I don't know what the published price was.

Q. Do you know whether or not Mr. Maffei made a sale of stock at around 50¢ a share around, or shortly after January, 1941?

A. I don't recall anything. If he did, he didn't mention it to me, I don't think. You mean some of his personal holdings?

Q. Yes. You didn't hear about it, did you?

A. No, I don't recall of any, I don't believe, no—not unless he could have mentioned it to me and I didn't pay any attention to it. It wasn't anything that the company had anything to do with.

Q. It is alleged in this complaint that these shares of stock had a value of over half a million dollars at the time of the transaction with Mr. Ber-cut? A. Yes.

Q. Did you consider that that was a fair value for this stock at that time?

A. The value that we speak of, of course, was supposed to be—it is a fair book value of that stock of that corporation. It is an accountant's valuation of it. It is not a market value, I don't assume, but——

Q. Well, what would you say was the fair market value of the stock at that time? You were president of one company and secretary of the other, and unquestionably kept in touch with brokers.

A. Well, I know, naturally, what—or in the neighborhood of what the market price was in small

(Deposition of Lloyd R. Arnold.)

lots of preferred or common stock, which I have commented on here.

Q. How about the common stock? What would you say was the fair market value at the time——

A. Are you just talking about individual shares or what? On an unlisted stock, what I am getting at is that there is no——there is no fair market value, I mean——

Q. Do you think you could have gotten anybody at that time——have you ever heard of anybody that would pay as much as 50¢ a share for the common shares in January, 1941?

A. Not to go out in the market and pick it up, no.

Q. And what would you say was——what in your opinion was the book value of the stock at that time?

A. Well, the book value of a stock—it would not be my opinion or anybody else's. It would be different—I mean it has to be——

Q. You mean just according to——

A. Just according to your net worth after setting aside your liabilities and finding the valuation of the physical properties that are on the books.

Q. Well, in January, 1941, you were president of Merchants Ice and secretary and manager of the affairs of this holding company——

Mr. Scampini: Now, just a moment. There is no evidence that he was manager of this company.

Mr. Goodman: Oh, yes, he has testified to it.

and L. R. Arnold, secretary-treasurer.

Mr. Scampini: No. He was president and secretary——

Mr. Goodman: Well, let's not argue about it.

Mr. Scampini: Well, let's not assume something that is not in evidence either. That is a conclusion.

Mr. Goodman: Q. From your familiarity with both companies, is it a true statement to say that the fair value of this stock was as much as a half million dollars?

Mr. Scampini: By "this stock" you mean the whole 78,000 shares, Mr. Goodman?

Mr. Goodman: Yes, 78,000 shares.

A. I will have to answer that this way: Every act on behalf of the holding company to protect that investment over a period of years has been based upon the belief that we believed in that value and its potential value; otherwise we would not have been liquidating other assets to preserve it. The control of a company of that size is a value that has no relation whatever to the market price on its stock, unless it were presumably an active listed stock, I would assume, on a regular stock exchange.

Q. Well, if you thought the stock was worth a half million dollars, you wouldn't have sold it for thirty-five thousand?

A. Well, we most certainly would not have sold the stock for thirty-five thousand if we could have—in other words, everything that we considered was its potential value and its value to that corporation, and it was certainly worth lots more than thirty-five thousand.

(Deposition of Lloyd R. Arnold.)

Q. You couldn't get anybody to buy it for that, of course?

A. At what figure? The half million, you mean?

Q. Oh, yes, or any figure any such size as that.

A. I had not been able to.

Q. Now, you don't want to put yourself—or do you want to put yourself on record here as attaching any real value to the stock of this corporation, which had been in great difficulties over all these years and that had been milked by its officers and directors and huge sums taken from it over many years until it was on the verge of complete collapse in January, 1941—you don't want to put yourself on record with respect to the stock of that corporation as having any real value at that time, do you?

A. Well, yes, I do.

Q. Oh, you do? A. Yes.

Q. And that is the reason why you sold it for \$35,000.00 to Mr. Bercut?

A. No, no, that isn't the reason.

Q. Well, what pressing demand was it——

A. Let's put it this way——

Q. What pressing demand on the holding company was there? Why did the holding company want to sell this stock at that time?

A. Well, our major asset was in a position of being—give me that question again.

Q. I say what pressing demand was there against the holding company in January of 1941 that made it essential that you sell the stock of the holding company?

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: Of the holding company?

Mr. Goodman: Q. To sell the stock of the Merchants Ice Company.

A. Well, it was the combination of reasons that I have already given here.

Q. Well, wasn't the main reason why you sold the stock, to get the Merchants Ice rehabilitated?

A. In order to protect the investment of the holding company—that was it, yes.

Q. And if there was no——

A. That was the main thing.

Q. And there was no demand on the part of any one against the holding company which made it necessary for you to sell the stock of Merchants Ice, was there?

A. No, we had plenty of obligations, but that wasn't——

Q. Well, in so far as those obligations were concerned, any one of the creditors could have put you into bankruptcy, couldn't they, and have sold out your assets? You weren't doing the holding company in that sense any particular constructive good, were you, by selling the stock?

Mr. Scampini: Aren't we engaged in a debate?

Mr. Goodman: Well, I suppose so—maybe so. I think your criticism is justified; but let me ask just one more question on that subject.

Q. The main purpose of making this transaction with Mr. Bercut, Mr. Arnold, was to bring about the rehabilitation of the Merchants Ice & Cold Storage Company? Wasn't that it?

(Deposition of Lloyd R. Arnold.)

A. Yes. I would like to qualify that, though, in this way. Bear in mind that our negotiations, as I said before, that we had centered our whole program on developing the Merchants, and in initiating these conversations it was for the purpose of doing the things that I have already stated here—bringing in money and credit to rehabilitate the Merchants; likewise to help ourselves, because we had hoped to have participation in that, but when we ended up on our transaction we didn't have it.

Q. But if you sold your stock you didn't have any further participation in Merchants Ice, did you?

A. Not unless we could have exercised the option there.

Q. Now, in addition to the service that that did to the Merchants Ice—the making of this deal—it was also very important for the holding company to make it for another reason, wasn't it, besides any claims or demands or obligations of the holding company? A. I don't get what you mean.

Q. I will reframe that question. To sum up: Your object in making the deal with Mr. Bercut was to bring about not only, as you put it, the rehabilitation of the Merchants Ice, but having in mind all the factors that you have described, the saving of the holding company as well?

A. Yes, that is correct.

Mr. Goodman: I would like to have the minute books offered in evidence on this deposition as a part of the deposition.

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: All right. Let them be deemed read, and we can read from the books.

Mr. Goodman: It may be stipulated that the four minute books which have already been offered for identification, as well as the account books——

Mr. Scampini: I am perfectly willing to offer them. Of course, I couldn't offer them yet.

Mr. Goodman: That is right. Let's make the stipulation this way: It may be stipulated that the four minute books that have been offered for identification may be considered as introduced in evidence, or admitted in evidence, and that the books may remain in the custody of Mr. Scampini, with either side having the right to access to them.

Mr. Scampini: That is so stipulated. This is off record.

(Discussion off record.)

Mr. Scampini: Let the stipulation run, that the current records of Pacific Empire Holdings and the general ledger and journal of said corporation which have been offered heretofore as plaintiffs' exhibits, whatever they were, for identification, may also be retained in the custody of Mr. Scampini, but that either side may have access to them and examine them at all reasonable times.

Mr. Goodman: Just one or two more questions and then I will be through.

Q. You stated in your direct examination on Thursday that you caused the election, or, rather, the holding company caused the election of Mr. Bercut as a director of the Pacific National Bank?

A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. Now, do you or do you not know whether Mr. Bercut had acquired some stock in his own name in the Pacific National Bank?

A. Well, he may have acquired some, but——

Q. Prior to or at the time——

A. Yes, I think that he did, now that you mention it; but what I meant to say is that Mr. Maffei and myself had the discussions with Mr. Gaither about Mr. Bercut as a new director there.

Mr. Goodman: That is all.

Redirect Examination

Mr. Scampini: Q. Now, Mr. Arnold, Mr. Goodman asked you what pressing obligation did the holding company have which compelled it to, or was sufficient in and of itself to compel you to make this deal with Mr. Bercut; and I am now asking you, isn't it a fact that the compelling obligation which finally prompted you to make this deal with Mr. Bercut was the necessity of obtaining \$25,000.00 for the purpose of repaying that amount to the Merchants Ice & Cold Storage Company?

A. That was part, yes. In other words, the basis of our original discussions—it was to pay that off and remedy the entire thing at once and rehabilitate the Merchants.

Q. Now, by "rehabilitate the Merchants," do you mean that you had to pay to the Merchants \$25,000.00?

A. At least that.

Q. Well, was that what you paid to the Merchants as a result of this transaction?

(Deposition of Lloyd R. Arnold.)

A. That is right.

Q. Was that in repayment of certain moneys which the holding corporation had borrowed from the Merchants? A. That is correct.

Q. And is that what you meant by "rehabilitate the Merchants"?

A. That would go a long ways toward that, yes.

Q. Well, did you do anything else as a result of this transaction which would have any bearing upon the rehabilitation of the Merchants?

A. On that one transaction, you mean?

Q. Yes.

A. The only thing that *would out* of the proceeds of that would be the \$25,000.00 that we paid to the Merchants.

Q. Then what else did the holding company do that had for its purpose the rehabilitation of the Merchants, as a result of this transaction? What else other than paying to the Merchants \$25,000.00 from the consideration received from the sale of the stock?

A. We ourselves didn't do anything, because we parted with our interest.

Q. What was the holding company going to do looking towards the rehabilitation of the Merchants as a result of this transactiion?

A. I don't get your question.

Q. That is a very simple question, isn't it?

A. We wanted to pay off some obligations.

Q. To whom?

(Deposition of Lloyd R. Arnold.)

A. We reduced our bank loan five thousand.

Q. All right. And what else?

A. And I think all of their charges, trust charges and interest, which was delinquent, was about—that ran it up to about eight thousand. We paid the landlord some money. I don't recall just what it was.

Q. What else did the holding company get as a result of this transaction?

A. It got nothing else other than the thirty-five thousand.

Q. Did you ameliorate the condition of the holding company as a result of this transaction? Did you improve it any? A. Very little.

Q. Did you improve it any at all?

A. Well, now, wait a minute—as a result of this transaction we naturally did not improve it, no.

Q. Well, as a result of this transaction you lost an asset? A. That is right.

Q. Which was carried on the books of the corporation at cost, wasn't it?

A. That is right.

Q. In excess of half a million, wasn't it?

A. We carried it on our books in excess of half a million dollars.

Q. Was that what it cost the holding company throughout this period of years—this block of stock?

A. I think if we added everything up, it probably would cost that.

Q. Yes. As a result of this transaction you got

(Deposition of Lloyd R. Arnold.)

\$35,000.00, of which \$25,000.00 was paid right back into the Merchants Ice & Cold Storage Company?

A. That is correct.

Q. And the other \$10,000.00 was kept clear by the holding company—is that right?

A. That is right.

Q. And you were minus the half million dollars?

A. We were minus the investment, yes.

Q. Now, what would the transaction have accomplished with respect to rehabilitating the Merchants—what did it accomplish in that respect?

A. We no longer had any interest in the Merchants, so as an investment it didn't accomplish anything for us.

Q. I am asking you now, what did it accomplish in regard to rehabilitating the Merchants, which you say you had in mind as a motive for making the transaction?

A. I will have to go back to our original discussions—that we had hoped to associate ourselves with some one—in this instance Mr. Bercut—who could lend it or give it the things like credit and capital which it needed—working capital which we didn't have. We did want to maintain a position, which we did not expect to be a majority, but it was probably going to be a minority. That was the basis of all our discussions, yes.

Q. By "minority", do you mean just a little bit less than half of 78,000 shares? Is that what you mean?

(Deposition of Lloyd R. Arnold.)

A. I would say a little less than half, yes.

Q. Now, I will ask you again, what bearing did this transaction have with respect to the objective of rehabilitating the Merchants Ice & Cold Storage Company? What did it do in that respect?

A. As a result of that deal it did those things, but we didn't participate.

Q. Well, who did? A. Mr. Bercut did.

Q. Mr. Bercut. You mean the new management?

A. The new management, yes.

Q. All right. Now, could you not have appointed a new management of Merchants Ice & Cold Storage Company without selling the stock?

A. If we had the ones who were willing to do that.

Q. Well, answer my question "Yes" or "No."

A. I could have appointed them.

Q. Yes. A. If I knew who could do that.

Q. Now, did you ever—Mr. Bercut at that time was a director of the Merchants Ice & Cold Storage Company, was he? A. That is correct.

Q. And he was elected to that office by the stock that the holding company owned—is that correct?

A. That is right.

Q. And at one of the meetings I understand you to say one of the directors—I don't know who—

A. Mr. Schinneller, I believe.

Q. (Continuing): —Mr. Schinneller suggested that you should resign? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. And Mr. Bercut should be president—didn't he?
A. Yes, that is right.

Q. Why didn't you resign?

A. I don't believe that we had started our conversations with Mr. Bercut yet.

Q. I am asking you why you couldn't have appointed Mr. Bercut president of the Merchants Ice & Cold Storage Company?

A. I believe Mr. Bercut declined that day.

Q. Did you ever offer to appoint him president?

A. After that subject came up, I think we asked Mr. Bercut how about it.

Q. And what did he say?

A. I think he declined.

Q. Did you approach him with respect to the negotiations with the idea in mind of changing the management of the Merchants Ice & Cold Storage Company as part of the transaction?
A. Yes.

Q. Did you suggest to him that if he bought a majority of the stock you would resign and he could become the president and general manager of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. What did he say to that?

A. Well, he was agreeable to it.

Q. Why didn't you do it? Why didn't you resign and appoint him president?

A. Well, I thought you were discussing this transaction that we worked out with him.

Q. Well, I am talking about the beginning of

(Deposition of Lloyd R. Arnold.)

the transaction, where you offered a partnership situation.

A. Oh, that is what I am talking about. Well, as our discussions got farther along we couldn't arrive at any agreement at the basis that we had started out on, which was, to wit, to associate ourselves—in other words, step into a minority position and have Mr. Bercut take the majority position and——

Q. Well, why couldn't you arrive at it?

A. Mr. Bercut wasn't agreeable to put up the money that we wanted.

Q. How much money did you want?

A. Well, we started out with seventy-five thousand.

Q. For half the stock that you owned—is that right?

A. That was the basis of our conversation.

Q. Did you consider that to be a fair value of such a block of stock?

A. I thought it was a fair approach in starting to accomplish the things that we were attempting to do.

Q. Would you please answer my question? I asked you whether or not you thought that the figure of \$75,000.00 for half of the stock that the holding company owned was, in your opinion, a fair value at that time? A. Yes.

Q. Then why did you come down to \$35,000.00 for all of it?

(Deposition of Lloyd R. Arnold.)

A. Because Mr. Bercut wasn't interested in putting up that amount of money.

Q. Did Mr. Bercut say he would pay not a cent more than thirty-five thousand?

A. At first we got to fifty thousand, and then down to thirty-five thousand.

Q. Why did you come down to fifty thousand? Why did you come down to fifty thousand?

A. In order to accomplish the things we were trying to do.

Q. I am asking you, why did you come down to a valuation of fifty thousand dollars for a majority of all the stock you owned, if at the beginning you thought seventy-five thousand dollars was a reasonable value?

A. Because Mr. Bercut wouldn't pay that figure.

Q. In other words, Mr. Bercut thought it was too high? Is that right?

A. Well, that is correct.

Q. All right. Then why didn't you say so?

A. I don't know just what you are getting at.

Q. Well, when you came down to fifty thousand what did Mr. Bercut say to that figure?

A. He wasn't satisfied with that figure.

Q. Did he say that was too high?

A. Yes, that was too high.

Q. Did you come down to forty thousand?

A. No, I don't think so.

Q. Did you come right down immediately next to thirty-five thousand?

(Deposition of Lloyd R. Arnold.)

A. I believe Mr. Bercut stated thirty-five, and I said, "We ought to have more so that we can pay off some of the obligations of the holding company."

Q. And what did he say to that?

A. Thirty-five thousand was his top figure.

Q. For how many shares?

A. All of it—we to get our option to buy back twenty thousand.

Q. Now, when you told Mr. Bercut that you wanted more money than thirty-five thousand so that you could pay off some of the obligations of the holding company, in view of the fact that the holding company was almost a half million dollar asset, what did he say to that?

A. Well, he didn't say any more.

Q. Did he say to you that the obligations of the holding company were none of his business?

A. I can't say that he said that, no.

Q. Well, how did he put it, if he said anything at all?

A. The only thing I can say is that, no matter what we would discuss or say, we couldn't get Mr. Bercut to pay any more for it.

Q. And who suggested the option for 20,000 shares at 50¢ a share?

A. I suggested it.

Q. Didn't you ask for an option of half of the 78,000 shares? You said you wanted to keep a minority position, didn't you?

A. I said that we wanted to keep a minority

(Deposition of Lloyd R. Arnold.)

position. That was before we got to the point of discussing an option to repurchase.

Q. Who fixed the number of shares to be optioned?

A. As a result of our conversations we arrived at an arbitrary figure of twenty thousand.

Q. Well, did you ask for more?

A. I don't remember. There were a lot of conversations here. I probably did ask for more, but I can't positively state.

Q. Weren't you interested in keeping a minority position in the company?

A. I wanted to get an option to buy all that Mr. Bercut would be agreeable to letting us buy.

Q. Who fixed the number of shares at twenty thousand? Did Mr. Bercut say to you that it was the most he would option back to you?

A. That was the most we could get, or I certainly would have got an option for more.

Q. Would you have taken an option for more if Mr. Bercut had been willing to give it to you?

A. Yes, we would.

Q. Did you try to get more than 20,000 shares under option from Mr. Bercut?

A. Yes, I tried to get more. I know that.

Q. Well, you certainly thought at that time that the stock was worth more than 50¢ a share, didn't you?

A. Yes, I did.

Q. And you would have been willing to take an

(Deposition of Lloyd R. Arnold.)

option back for two years for all of this block of stock at 50¢ a share, wouldn't you?

A. If we could have got it, sure.

Q. Did you ask for it?

A. I don't believe that I asked for the full amount, no.

Q. Did you ask for more than 20,000 shares?

A. Yes, I asked for more.

Q. And Mr. Bercut refused—is that right?

A. Yes, that is all I could get.

Q. All right. Now, who suggested the clause in the contract here reading as follows:

“It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation.”

A. Mr. Bercut said he would have to have the voting rights.

Q. So the option was given you subject to that stipulation—is that right?

A. That is correct.

Q. Who suggested the clause: “All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000 shares of common stock, hereinabove referred to are not assignable.”?

A. Mr. Bercut stated that.

Q. Did he give you any reason why he wanted

(Deposition of Lloyd R. Arnold.)

this restriction on the right of the holding company to buy back this 20,000 shares by prohibiting it from assigning the option?

A. No, I don't recall any reason for it. In fact, I didn't think much about it, I guess.

Q. Well, you mean to say that you paid no attention to that clause when you dictated it, Mr. Arnold?

A. I most certainly did pay attention to it.

Q. Did it make any impression upon you when that clause was put in there?

A. Mr. Bercut wanted it that way.

Q. Well, why did he want it that way? Did he say at all? Did he give you his reasons?

A. No, I don't think so.

Q. Well, isn't it a fact that he told you he didn't want any one else to exercise this option but the holding company?

A. He said that he was giving that option to the holding company.

Q. Yes. A. The holding company only.

Q. Yes.

A. And that was the reason for putting it that way.

Q. Didn't you tell him when he made that statement, Mr. Arnold, that Mr. Bercut knew that the holding company could never exercise this option?

A. Oh, well, that is a little different. Yes. I said this to Mr. Bercut—I said, "Well, after all, I don't know how we are going to get the ten thou-

(Deposition of Lloyd R. Arnold.)

sand, and furthermore we are still obligated to the Merchants."

Q. And what did he say to you about that?

A. I can't recall what he said.

Q. Well, why didn't you insist on having that option available to the holding company or any one else that the holding company might want to sell it to or assign it to?

A. Because—I can only answer it this way, that we had to get the transaction over then, and I wasn't going to raise arguments or conditions that were technical there.

Q. You mean you were in a hurry to close the deal? Is that it?

A. I have already stated the reason——

Q. Answer "Yes" or "No," were you in a hurry? A. Yes, I was.

Q. And Mr. Bercut knew you were in a hurry, didn't he? A. He did, yes.

Q. You told him so, didn't you?

A. Certainly.

Q. You told him that these clauses were not fair, didn't you?

Mr. Goodman: He didn't say that.

Mr. Scampini: I am asking him if he did or did not.

Mr. Goodman: Oh.

A. I didn't say that in so many words, but——

Mr. Scampini: Q. Substantially?

A. It goes without saying we wanted a block of

(Deposition of Lloyd R. Arnold.)

that stock to be retained by the holding company, retained by the option. We wanted all we could get. We got that. I have lost your question now. Did I answer it there?

Mr. Scampini: Read the question, Mr. Reporter, and see if you can answer the question without jumping all over the field.

(Last question read.)

Q. Did you or did you not tell him that they were unfair? A. Not in those words.

Q. Well, what did you say to him?

A. I told him it wasn't what we wanted.

Q. And what did he say to that?

A. That it was all he could do.

Q. And because of the pressure of circumstances, you felt that you should make the deal? Is that right? A. That is it exactly.

Q. Now, when he told you that this was all he could do, did you ask for two or three days time in which to think it over?

A. No, that was the final agreement.

Q. Did you ask for two or three days time within which to see if the company could make a better deal anywhere else? A. No, I did not.

Q. Did you ask for two or three days time in which to find out if the board of directors would approve this kind of a deal?

A. No, I didn't.

Q. Did you deliver to Mr. Peter Bercut the 78,358 shares of stock of the Merchants Ice & Cold Storage Company referred to in this agreement?

(Deposition of Lloyd R. Arnold.)

A. We delivered all but—I think there was a few shares we didn't work out in this—1400 shares.

Q. Where are the 1400 shares now?

A. Mr. Will Morrish has them somewhere.

Q. What is he doing with them?

A. In the contract file there is an agreement where we—in other words, while Mr. Sherman was president of the Merchants, in order to get Mr. Morrish to come in—he was close to the Anglo, and we were having trouble with our loans there, and we wanted him to do so, and—well, he wanted a fee to serve on the board of directors and as a member of the committee down there, and we paid him. We started out with \$100.00 a month, and I think it ended up with two hundred and fifty a month, and then as a part of the agreement—in other words, if he ever left the Merchants or our policies didn't agree; it was a sort of mutual understanding that we should pay him the number of months. I can't think how many. That agreement is around there somewhere.

Q. Whose shares are these 1400 shares?

A. They belong to the holding company.

Q. What are they—preferred or common?

A. They are mostly common.

Q. All the rest of the stock has been delivered to Mr. Bercut?

A. All the rest has been delivered to Mr. Bercut.

Q. Now, you made some statements about the value of this stock on the market. Preferred stock

(Deposition of Lloyd R. Arnold.)

was worth from a dollar to two dollars and a half per share during the period 1938, '39 and '40—is that right? A. The preferred stock?

Q. Yes. A. Yes.

Q. Now, was the condition of the Merchants Ice & Cold Storage Company better or worse, substantially speaking, generally speaking, in 1938 or '39, than it was in 1934? A. Yes.

Q. Was it better or worse? A. In '38?

Q. Yes. A. Yes, it was better.

Q. It was better than it was in 1934, wasn't it? A. Yes.

Q. The bond issue had been——

A. Oh, surely.

Q. (Continuing:) ——had been deferred?

A. Yes.

Q. And the company had been reorganized in the Federal Court—is that right?

A. That is right.

Q. You had gotten a postponement of the maturity of your bonds? A. That is right.

Q. And \$40,000.00 a year of bonds had been paid off continuously since 1934—isn't that right?

A. That is right, up to the date of the reorganization.

Q. And thereafter they were paid off according to the indenture, weren't they?

A. That is right.

Q. And the interest had been paid right along?

A. That is right.

(Deposition of Lloyd R. Arnold.)

Q. And the debts of the company in 1938 were less, were they not, than in 1934?

A. They were less, yes.

Q. In other words, the company was much better, in your opinion, was it not, financially speaking and also from an operating point of view, in 1938 and '39, than it was in 1934—wasn't it?

A. Most certainly.

Q. Then I will ask you to take a look at this contract and see if you recognize it (showing document to the witness). A. Yes, I do.

Q. What is that contract? I will ask it this way: Did you in 1934 agree to buy from Mr. Roussel, a director of Merchants Ice & Cold Storage Company, 700 shares of preferred stock of Merchants Ice & Cold Storage Company for \$11,200.00?

A. We did.

Mr. Goodman: Excuse me. That is 1934?

Mr. Scampini: Yes.

Mr. Goodman: I would like to object to that on the ground—well, let it go. Go right ahead.

A. Yes, we did.

Mr. Scampini: Q. Did you think that that was a fair value for that stock for 700 shares of preferred stock in 1934? A. Yes, I did.

Q. And do you think that the sum of \$10.00 a share for preferred stock would be a fair value for preferred stock in 1938?

A. Yes, with all the accumulated dividends particularly.

(Deposition of Lloyd R. Arnold.)

Q. Now, was the condition of the Merchants Ice & Cold Storage Company better or worse in January of 1941 than it was in 1938, generally speaking?

Mr. Goodman: Of course, that does call for his opinion.

Mr. Scampini: Yes, I know; but when we come to opinions, I think you have gone into it quite at length. He was president of the company at the time.

Mr. Goodman: Well, of course—I will make the objection it calls for his opinion and——

Mr. Scampini: I will withdraw the question and reframe it.

Q. In 1940 and 1941, you were president of the Merchants Ice & Cold Storage Company?

A. That is right.

Q. You were also a director in 1938 and 1937, weren't you?

A. That is right.

Q. You were generally familiar with the financial and operating condition of the company throughout those periods of years, weren't you?

A. That is correct.

Q. You knew the conditions of the company intimately in 1938, '39 and '40, didn't you?

A. Yes.

Q. You often loaned money to the Merchants Ice & Cold Storage Company from the holding company during that period of years?

A. Many times.

(Deposition of Lloyd R. Arnold.)

Q. And you examined the balance sheets and earnings statements with great scrutiny during that period of years, didn't you?

A. I was very familiar with them.

Q. Now, I will ask you whether or not the financial condition of the company in January of 1941 and its operating condition were better or worse than they were in 1938?

Mr. Goodman: The same objection.

A. The general financial condition was—its earnings were higher. The general financial condition of the Merchants was better.

Mr. Scampini: Q. There were just some pressing immediate problems—is that right?

A. It is a combination of the things I have mentioned here. In a general way, its financial condition—its general financial condition would have been better, yes.

Q. And its earning position was better than it was in 1938, wasn't it?

A. 1939 I believe was our best year. 1940 wasn't quite as high, but it was good.

Q. I will ask you, was it worse in 1938? Instead of "was it better?" Was it worse?

A. Was it worse in 1938?

Q. In 1941—was it worse in 1941, at the end of 1940, than it was at the end of 1938?

A. I have just said its general condition was better.

Q. All right. Now, if you thought that the rea-

(Deposition of Lloyd R. Arnold.)

sonable value of preferred stock in 1938 was at least \$10.00 a share, and it was \$10.00 a share and more in 1934, then why did you agree to sell 12,000 shares of preferred stock and 65,000 shares of common stock for \$35,000.00, Mr. Arnold?

A. Because of the pressure of circumstances that I have just testified about.

Q. And not because you thought that was the reasonable value?

A. Absolutely no. I thoroughly believed in the future of Merchants.

Q. What would you think that the actual reasonable value of this block of stock, free from pressure, was in January of 1941?

A. I believe in the value that we carried it at.

Q. Was that half a million dollars?

A. I believed in that, or else we would not have carried it at that.

Q. All right. But because of these pressing conditions you thought it advisable to sell the whole thing for \$35,000.00? Is that right?

A. That is correct.

Q. And you never would have sold it in the absence of those pressing conditions? Is that right?

A. No, I would not.

Q. All right. Now, Mr. Goodman asked you whether or not Pacific Empire Corporation lost the stock—whether the stock of Pacific Empire Corporation lost its value when it lost the Pacific National Bank stock, which it did a few months ago, and you said yes. Is that right?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: No.

Mr. Scampini: Maybe I misunderstood. I withdraw the question. I thought Mr. Goodman had asked you that question. Perhaps I misunderstood.

Q. Did you have any other informal understandings with Mr. Peter Bercut with regard to an additional consideration besides that which is enumerated in this letter agreement?

A. None whatsoever.

Q. Did you have any discussion with Mr. Peter Bercut about the Merchants Ice & Cold Storage Company wiping out the balance of the indebtedness of the holding company to Merchants Ice & Cold Storage Company?

A. In our conversation about this time I think I asked, probably, if something like that could be done or should be done.

Q. What did he say to you?

A. Well, he would give it some thought.

Q. Is that all he said to you?

A. We didn't have any understanding, written understanding or agreement on the subject.

Q. Are you prepared to state under oath that the only understanding you had with Mr. Peter Bercut with respect to the sale and purchase of this block of stock is that which is enumerated in this letter agreement?

A. Except just what I have said, yes.

Q. Well, what do you mean by "except just what I said, yes?"

A. In other words, I think I made the statement

(Deposition of Lloyd R. Arnold.)

once myself that that—that those obligations should be written off or forgotten about, or something; it certainly wasn't collectible.

Q. Mr. Arnold, why wasn't it collectible?

A. Well, we didn't certainly have the cash to pay for it then.

Q. You didn't have any assets left, did you?

A. Not to speak of, no.

Q. When the Merchants Ice & Cold Storage Company went, why, the only real asset of the company went with it, didn't it?

A. The main asset left.

Q. Was there anything left except the Pacific Empire Corporation stock?

A. No, except the laundry.

Q. Well, the laundry, in which the company owned only 47½%?

A. That is right.

Q. And you had pledged that to Howard Ellis as security for a debt, had you not?

A. I believe it was pledged then, yes.

Q. And the Pacific Empire Corporation stock was worth money only while the holding company could pay its debts to the corporation? Is that right?

A. That is right.

Q. And the holding company had no more money with which to pay its debts? Is that right?

A. That is correct.

Q. So you couldn't see any salvation for it—is that right?

A. I certainly couldn't see very much, no.

Q. So you made the deal with Mr. Bercut?

(Deposition of Lloyd R. Arnold.)

A. Certainly I did, yes.

Mr. Scampini: I think that will be all.

Mr. Goodman: I have a few questions.

Recross Examination

Mr. Goodman: Q. In addition to the other pressing financial obligations of the Merchants Ice in January, 1941—that is, in addition to the ones we have already talked about heretofore—it is a fact, is it not, that the money was not available for the next payment of interest on the bonds?

A. The next payment wasn't due until April 1st, I believe, of each——

Q. A certain number of bonds were to be retired at that time, were they not, under the indenture? There was \$40,000.00 worth of bonds——

A. Well, my hesitancy was—I was thinking that that came up the following year. The interest was coming due on April 1st.

Q. And \$40,000.00 in bonds had to be retired?

A. I am not sure of my dates on that.

Mr. Scampini: Pardon me. Off record.

(Discussion off record.)

A. I was thinking it was the following year. I may be wrong.

Mr. Goodman: We will pass that for the moment.

Q. This transaction that you referred to with Mr. Roussel in 1936, by which the shares were purchased—Roussel was a stockholder of the Merchants Ice, who wanted to get a job down there? Isn't that the case? Isn't that the situation that you are referring to?

(Deposition of Lloyd R. Arnold.)

A. Well, if he ever wanted a job, I didn't know that.

Q. Wasn't that the reason why they purchased his stock?

A. No, he was there, it seems to me, as a friend of Mr. Sherman—I don't know. At least, he had been on the Board of the Merchants for quite a while.

Q. But that was a special transaction that was entered into with Mr. Roussel for some reason or another to acquire his stock, wasn't it?

A. Well, there was a block of stock that we wanted; we tried to get any that we could.

Q. But there was some particular reason that caused the purchase of Roussel's stock in 1936, wasn't there?

A. We had—the holding company gave him an option, which then we took up later on—gave him the option in 1934, I believe it was, and took it up in 1936.

Q. What money was used to buy the Roussel shares of stock? Where did you get the money to pay for those shares?

A. That was all paid—that was paid from the Merchants, but charged to the holding company.

Q. So that—

A. I am not sure whether all the payments were that way, but I think the majority of them were.

Q. But that is the way his stock was bought—that is the way his stock was acquired?

(Deposition of Lloyd R. Arnold.)

A. Well, at that time the Merchants was obligated to the holding company.

Q. The Merchants had an obligation to the holding company on loans——

A. Of the holding company to the Merchants, yes.

Q. Now, when you were discussing this deal with Mr. Bercut—strike that out. Am I correct in saying that during the discussions with Mr. Bercut concerning this deal, that Mr. Bercut said that he would not be interested in making a deal for the purchase of this stock unless he was able to have the controlling interest and elect a board of directors of his own choosing—that is, a majority of the board of directors?

A. Well, he wanted to, yes.

Q. And is it not also a fact that in connection with the same conversation that he stated that he did not want to have men who had been so unsuccessful in operating this company continue on the board of directors? A. Yes, he said that.

Q. Now, at the time that you completed the transaction with Mr. Bercut, it is a fact, is it not, that you knew—that there was no other place that you knew of that you could make a deal for the holding company that would accomplish the purposes that you have stated you had in mind?

A. Yes, that is correct.

Q. And you dickered back and forth with Mr. Devoto—or with Mr. Bercut, and as a result of

(Deposition of Lloyd R. Arnold.)

dickering back and forth on the matter the final figure that was arrived at was \$35,000.00?

A. That is correct.

Q. That was as high as Mr. Bercut felt he could go?

A. As high as he would go.

Mr. Goodman: One other matter before we conclude the deposition, Mr. Scampini.

Mr. Scampini: Yes.

Mr. Goodman: In the complaint the proceedings in Delaware are set forth. Are you willing to furnish us at our expense with copies of the Delaware proceedings?

(Discussion off record.)

Mr. Goodman: Well, I think that is about all. Now, how about signing it?

Mr. Scampini: I have just two more questions.

Redirect Examination

Mr. Scampini: Q. Mr. Arnold, at the time you made the deal with Mr. Bercut, Mr. Chase was a large creditor of the holding company, was he not?

A. Yes, he was.

Q. Did you ever go upstairs to see Mr. Chase and find out whether he would be willing to pay you a higher price than \$35,000.00 for this block of shares?

A. No.

Q. Sometime during the course of your business affairs with Mr. Chase, which I understand ran over a long period of years——

A. Yes.

Q. (Continuing:) ——Mr. Chase had told you

(Deposition of Lloyd R. Arnold.)

whenever you would be ready to dispose of Merchants Ice he might be interested?

A. I don't know whether he said it in those words. He said something about his interest in the Merchants, yes, and he was upset when he found that we had sold it.

Q. Now, did you ever ask Mr. Joseph I. McInerney whether he would be interested in paying more than \$35,000.00 for this block of shares?

A. No, I didn't.

Q. During the period of time that you had been associated with Mr. McInerney—strike that out, Mr. Reporter, please. Mr. McInerney from time to time had loaned the holding company money, had he not, from 1934 until 1940? A. Yes.

Q. From time to time he had loaned money for the use of the Merchants Ice & Cold Storage Company, had he not? A. Yes.

Q. In fact, one of the principal installments on the bond issue of the Merchants Ice & Cold Storage Company was made by the holding company borrowing from Mr. McInerney the proceeds? Isn't that right?

A. I don't know whether we borrowed the full amount for the sinking fund requirement—

Q. Was it interest?

A. Incidentally, I know definitely that we borrowed the taxes once.

Q. Yes.

A. And we borrowed to make up on the interest.

(Deposition of Lloyd R. Arnold.)

Q. Now, the holding company had bought a large block of stock in the Merchants Ice & Cold Storage Company from Mr. McInerney, had it not?

A. Yes, we did. That was our original meeting.

Q. And Mr. McInerney was attorney for the Merchants Ice & Cold Storage Company after I resigned, wasn't he?

A. Yes, he was—that is, his office of McInerney & Vucinich.

Q. He was quite familiar with the financial condition and operating condition of the Merchants Ice & Cold Storage Company, wasn't he?

A. He was familiar with it all right.

Q. Isn't it true that sometime during the last two or three years in one of your discussions with Mr. McInerney, that he advised you that he might be interested in the event that you were——

A. Yes, he did.

Q. Did you take it up with him after Mr. Ber-cut told you he wouldn't pay you more than \$35,000.00?

A. No, I didn't.

Q. In the course of years that Mr. Scampini was a director of the Merchants Ice & Cold Storage Company and also an attorney for the company, isn't it true that Mr. Scampini told you on numerous occasions that in the event the holding company should ever have to sell that block of stock, that he or some of his associates might be interested in it?

A. Yes, you always expressed interest in that.

Q. And when it came to selling this block of

(Deposition of Lloyd R. Arnold.)

stock to Mr. Peter Bercut, at that time Mr. Scampini was a creditor of the holding company, wasn't he? A. Yes.

Q. Did you come over to discuss with Mr. Scampini the advisability of selling this stock or ask him whether he would be interested in it?

A. No, I didn't.

Q. Now, isn't it true that after you sold this block of stock to Mr. Peter Bercut, that Mr. Scampini met you and Mr. Maffei on one occasion on the street and asked you what was behind the deal of the holding company and Mr. Peter Bercut that he had read in the newspaper?

A. I do remember meeting you on the street, yes.

Q. And isn't it true that you and Mr. Maffei told Mr. Scampini at that time that you had only sold a majority holding and that you retained a minority holding in the Merchants Ice & Cold Storage Company?

Mr. Goodman: Of course, this is cross-examination of your own witness, and also calls for——

A. We told you that we had sold the majority of our holdings, and that we had retained some, yes.

Mr. Scampini: Q. That is right. And the first time that Mr. Scampini, so far as you know, discovered the true facts was when you came here with Mr. Maffei and discussed this whole picture with me when you received this letter from Mr. Wingate? Isn't that right?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: I will object to that as calling for a conclusion, and cross-examination.

Mr. Scampini: Yes. I will withdraw the question. That is all.

Mr. Goodman: I think that is all.

Mr. Scampini: Another question—just a minute.

Q. Isn't it true that you told Mr. Richards and Mr. Ryerson, Mr. Arnold, after the deal was made, that the Merchants Ice & Cold Storage Company retained a minority interest therein?

Mr. Goodman: The same objection.

A. Without going into the details of the transaction, I indicated then that we had retained some stock. I didn't want to——

Q. Yes. No further questions.

L. R. ARNOLD

“PLAINTIFFS’ EXHIBITS 1-A, 1-B, 1-C
AND 1-D FOR IDENTIFICATION”

Minute Books, Vols. I, III, IV and V

“PLAINTIFFS’ EXHIBIT No. 2”

ASSIGNMENT BY WAY OF PLEDGE

Know All Men by These Presents:

That whereas Pacific Empire Holdings, Inc., a corporation, hereinafter known as First Party, and Pacific Empire Corporation, a California corporation, hereinafter known as Second Party, did, on the 15th day of May, 1935, enter into an agree-

ment, a copy of which agreement is hereto attached and made a part hereof by reference; and

Whereas, under and by virtue of said agreement First Party did agree to assign over and unto Second Party 49,944 $\frac{1}{3}$ number of shares of common stock, and 3,990 number of preferred stock, of Merchants Ice & Cold Storage Company, a California corporation, as security for the payment to said Pacific Empire Corporation of any and all indebtedness due or owing by First Party to Second Party under the said agreement and created by virtue of loans to be made pursuant thereto by Second Party to First Party;

Now, therefore, in consideration of the premises and as and for the purpose of securing the payment of any and all of such obligations incurred by First Party to Second Party, and for the purpose of paying, according to their respective tenors, any and all promissory notes or other evidences of indebtedness now owing, or hereafter to be incurred, by First Party, either pursuant to said agreement, or by reason of any other acts of borrowing by First Party from Second Party, or by reason of any assumption of any liability by first Party from Second Party, or for any other reason whatever, First Party does hereby assign, transfer and sell and set over unto Second Party 49,944 $\frac{1}{3}$ number of shares of the common stock, and 3,990 number of shares of preferred stock of Merchants Ice & Cold Storage Company, a corporation, represented by the certificates of stock described on the hereto

attached Exhibit "A", all of which said shares of stock and certificates are now on pledge with Joseph McInerney as security, together with other collateral, for the payment to said Joseph McInerney of a promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, dated May 8, 1935, executed jointly to said Joseph McInerney by First Party and Second Party herein;

This assignment by way of pledge is executed specifically subject to the lien created by said pledge to said Joseph McInerney, and Second Party does hereby accept the assignment, transfer and sale of said shares, as security for the payment of the indebtedness hereinabove referred to, subject to the lien created in favor of said Joseph McInerney by said pledge agreement, and does further admit and declare that the said promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, executed jointly between the First Party and Second Party to said Joseph McInerney, is the primary and sole obligation of Second Party herein, and said promissory note is to be paid according to its tenor by Second Party herein, and any and all collateral pledged with said Joseph McInerney by First Party herein, as security for the payment of said promissory note, is the sole and absolute property of First Party and is to be returned to First Party free and clear of any claims on the part of said Joseph McInerney arising out of said promissory note for which the same are held as security.

In Witness Whereof, the parties hereto have hereunto set their hands this 15th day of May, 1935, by their officers thereunto properly authorized by a resolution of their respective board of directors.

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI,

President.

By A. A. HEER, JR.,

Secretary.

PACIFIC EMPIRE HOLDINGS,
INC., a Delaware corporation,

By L. R. ARNOLD,

First Vice-President.

By A. A. HEER, JR.,

Treasurer.

[Endorsed]: Assignment by way of pledge.

Dated: June, 1935.

“PLAINTIFFS’ EXHIBIT No. 3”

PACIFIC EMPIRE HOLDINGS

Incorporated

Second Copy

January 8, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, California

Dear Mr. Bercut:

The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the controlling shares of stock of Merchants Ice and Cold Storage Company, now owned by this corporation.

The purchase price, as agreed to be paid by Peter Bercut, is \$35,000.00, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common stock.

It is agreed by this corporation that out of the proceeds of this sale, to wit, \$35,000.00, the sum of \$25,000.00 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining, the sum of \$6,000.00 is to be

remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank.

It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4,100.00 is to be delivered to Peter Bercut when this obligation is paid.

It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two years from date hereof. It is understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000 shares

of Common stock, hereinabove referred to are not assignable.

Yours very truly,

PACIFIC EMPIRE HOLDINGS,
INCORPORATED

By.....

Pres.

By.....

Secy.

Agreed and Accepted:

.....
Peter Bercut

“PLAINTIFFS’ EXHIBIT No. 4”

March 31, 1940

Pacific Empire Holdings, Inc.

26 O’Farrell Street

San Francisco, California

Gentlemen:

Because of the pressure of other business, I will be unable to devote sufficient time to the company to be of real value.

Consequently, please consider this lettter my resignation as an Officer and Director of Pacific Empire Holdings, Inc.

Yours very truly,

PETER BERCUT

PB/lk

“PLAINTIFFS’ EXHIBITS 5-A, 5-B AND 5-C
FOR IDENTIFICATION”

Current Records of Pacific Empire
Holdings; General Ledger; and Journal

“DEFENDANTS’ EXHIBIT A.”

THOMAS H. WINGATE

Attorney at Law
Equitable Building
Wilmington, Delaware

July 16, 1942

Pacific Empire Holdings, Inc.
26 O’Farrell Street
San Francisco, California

Dear Sirs:

I have been retained by a group of stockholders of Pacific Empire Holdings, Inc. who have requested that I file a Bill of Complaint against the corporation, seeking the appointment of a receiver on the ground of mismanagement and for the purpose of having a receiver to bring stockholders’ derivative action against the individual directors for mismanagement and waste of the corporate assets. The stockholders also request that I file a petition for a Writ of Mandamus to secure a full and complete examination of the corporation’s books and records.

I am reluctant to resort to these extraordinary remedies without giving the management an oppor-

tunity to state their position. If you care to discuss these proceedings with me, I shall be glad to do so. In the event I do not hear from you on or before July 29th, I shall understand that you do not wish to discuss the matter, and I will proceed to file the proceedings.

Very truly yours,

THOMAS H. WINGATE

W/mlt

(Incorporated) Holdings Ltd., Incorporated
 151934 by amendment to
 Articles of: Pacific Empire Holdings, Incorporated

Authorized Capital
 Issued

500,000 Sh. 10 cent Par Value
 3,56,711 Sh.

Liabilities

Accounts Payable, Where
 Account Pay, Holder & Chase - Rent.
 General Interest Payable - Where

129551
 407500
 46647

Notes Payable
 Corporations Trust Co
 Pacific National Bank
 A. J. Corporation
 Edward Malheur
 Henry Everett
 Holder in Chase

1659939

175000
 117000
 55825
 188788
 385000
 743326

Notes Payable

San Francisco Branch 1900-01
 San Francisco General Property
 Hawaiian Branch

63130

5137
 10668
 47325

Inter Company Notes Due Accounts
 Paid: Pacific Empire Inc. Note Pay.
 Pacific Empire Corporation Note Pay.
 Liquidating Agent, City National Bank

1188381

12664680
 7165462

Merchant Inc. and Cold Storage Co

2501537
 2501537

To Pay 5284.05
 Corp Inc 36.46

Defendants Ex. of Security

RR Robinson
 Renter

901

State of California,
City and County of San Francisco—ss.

I, Mary T. Collins, a Notary Public in and for the City and County of San Francisco, State of California, do hereby certify:

That the witness in the foregoing deposition named, Lloyd R. Arnold, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said deposition was taken at the times and place therein named; that the testimony of said witness was taken down in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and by him thereafter reduced to long-hand typewriting, under my supervision, and when completed, was carefully read to, or by, the said witness, and, being corrected by him in every particular he desired, was by him thereafter duly subscribed.

And I further certify that I am not of counsel or attorney for either of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 8th day of October, one thousand nine hundred and forty-two.

MARY T. COLLINS

Notary Public in and for the City and County
of San Francisco, State of California.

[Notarial Seal]

My Commission expires March 30, 1943.

[Endorsed]: Filed Apr. 21, 1943. Walter B. Maling, Clerk.

[Endorsed]: Reporter's Transcript. Filed Aug. 13, 1943.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW PROPOSED BY THE PLAINTIFF

The above entitled cause coming on regularly to be heard on the 20th day of April, 1943, before the above entitled Court, without a jury, Honorable Michael J. Roche presiding, a jury trial not having been demanded; plaintiff appearing in Court by his attorneys A. J. Scampini, L. F. Mahan, Howard Ellis and C. T. Hubner; defendants, Peter Bercut and Henry Bercut, appearing in Court by their attorneys, Louis H. Brownstone and George M. Naus; defendants, M. Maffei and L. R. Arnold, appearing in Court by their attorney J. A. Pardini; the above entitled cause having been dismissed in open Court as to all other defendants; and oral and documentary evidence having been introduced on April 20, 1943, [418] and the cause having been duly and regularly continued to and tried on successive days thereafter and oral and documentary evidence having been introduced on said days, and the matter having been briefed by counsel for all parties and having been submitted to this Court for decision,

and the Court being fully advised in the premises now finds:

FINDINGS OF FACT

I.

That this Court has jurisdiction of the above entitled cause. Plaintiff was at the time of the commencement of this action and still is a citizen and resident of the State of Delaware. Pacific Empire Holdings, Incorporated, at all times was, and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Each of the defendants named in the complaint on file herein was at the time of the commencement of this action, ever since has been, and still is a citizen and resident of the State of California, and [419] resides within the jurisdiction of this Court. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.

II.

Pacific Empire Holdings, Incorporated, a Delaware corporation, has its principal office in the City and County of San Francisco, State of California, and at all times has conducted its principal activities in said city and state. On the 31st day of August, 1942, in the Court of Chancery of the State of Delaware in and for New Castle County, in that certain action of Rebecca Tanzer and Elizabeth Wilhelm, complainants, vs. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, defendant, upon proceedings being duly

had in said Court pursuant to provisions of section 4407 of the Revised Code of Delaware of 1935, the said Pacific Empire Holdings, Incorporated, was adjudged and decreed to be insolvent in the equity sense, and Thomas H. Wingate, the plaintiff herein, of the City of Wilmington, State of Delaware, was appointed Receiver of Pacific Empire Holdings, Incorporated, with full power to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts due and belonging to the said Pacific Empire Holdings, Incorporated, and with power to prosecute and defend in the name of said Pacific Empire Holdings, Incorporated, or otherwise, all claims and suits. Said Thomas H. Wingate has qualified as such receiver of and for Pacific Empire Holdings, Incorporated, and he is now the duly appointed, qualified and acting receiver in equity for said corporation.

Under and pursuant to Section 4408 of the Revised Code of Delaware of 1935, now in full force and effect, said Thomas H. Wingate, as such receiver, has been and now is vested with the title of said Pacific Empire Holdings, Incorporated, a corporation, [420] to all its books, papers and documents, interests in patents, patent rights, copyrights, and trade-marks, rights of action arising upon contract or from the unlawful taking or detention of or injury to property, real, personal or mixed, of whatever nature, kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware.

III.

Pacific Empire Holdings, Incorporated, was originally incorporated under the laws of the State of Delaware with the name of Associated Calitalo Holdings, Ltd. Inc., and thereafter by amendment to its certificate of incorporation duly made in accordance with the law its corporate name was changed to Pacific Empire Holdings, Incorporated. As of this day Pacific Empire Holdings, Incorporated, has outstanding 2,500,000 shares of common stock of a par value of ten cents (10¢) a share owned by approximately 10,000 stockholders. It has aggregate liabilities in excess of \$250,000. Its principal activities have at all times been conducted in California.

IV.

Beginning on or about 1931 and continuing thereafter Pacific Empire Holdings, Incorporated, from time to time acquired, for the sum of \$400,000, shares of stock consisting of common and preferred of Merchants Ice and Cold Storage Company, a California corporation, conducting and operating an ice and cold storage business in the City and County of San Francisco, State of California. The shares of stock so acquired by Pacific Empire Holdings, Incorporated, represented, in the aggregate, the control of said corporation. [421]

V.

On or about December 31, 1940, Pacific Empire Holdings, Incorporated, was the owner of 78,358 shares of the capital stock of Merchants Ice and Cold Storage Company, consisting of 12,493 shares

of preferred stock of the par value of \$10 per share, and 65,863 shares of common stock of the par value of \$10 per share. The said preferred shares of stock of Merchants Ice and Cold Storage Company were entitled to cumulative dividends at the rate of 7% per annum, and as of December 31, 1940, the amount of dividends which had been accumulated on said outstanding preferred shares and remaining unpaid was the sum of \$11.20 per share.

VI.

As of December 31, 1940, Merchants Ice and Cold Storage Company had a net book worth of \$1,415,725 represented by 41,615 shares of \$10 par preferred stock outstanding, and 107,180 shares of common stock, without par value, outstanding. The Court finds that said company has been continuously engaged in a general cold storage and ice manufacturing business in San Francisco from since about 1890; that at no time had it ever defaulted in any of its obligations; that the operations of said company during the years 1939 and 1940 reflected a substantial improvement over immediately previous years; and that it was a solvent concern. [422]

VII.

On or about December 31, 1940, Pacific Empire Holdings, Incorporated, had aggregate liabilities in excess of \$250,000, evidenced by promissory notes outstanding, accounts payable and unpaid taxes. Among such liabilities was a judgment obtained by the United States of America in an action filed by

the United States of America in the above entitled court against Pacific Empire Holdings, Incorporated, being action No. 21147-W, in the office of the Clerk of said Court. In this said action, on November 20, 1940, judgment had been obtained in favor of the United States of America against Pacific Empire Holdings, Incorporated, in the sum of \$11,945.32. Said judgment on December 31, 1940, was and still is unpaid. On December 31, 1940, the only substantial assets of Pacific Empire Holdings, Incorporated, other than the said 78,358 shares of common and preferred stock owned by it in Merchants Ice and Cold Storage Company were as follows:

47½% or thereabouts of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating laundries in Bakersfield, California, of nominal value;

52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation, of nominal value.

VIII.

Continuously since approximately the year 1933 up to and including on or about January 28, 1941, the defendants M. Maffei, Peter Bercut and L. R. Arnold were, and each of them was either an officer or a director or a member of the Executive Committee of Pacific Empire Holdings, Incorporated, a corporation. During said period M. Maffei was

President, Peter Bercut was Vice President and L. R. Arnold was Secretary-Treasurer of said corporation. On or about February 15, 1933, Peter Bercut was elected and became a director of said corporation. On or about February 19, 1935, Peter Bercut was elected and became a member of [423] the Executive Committee of said corporation and on or about March 28, 1933, defendant Peter Bercut was elected and became a Vice President of said corporation. Said Peter Bercut continued as a director, vice president and member of the Executive Committee of said corporation until his resignation as such director, officer and member on or about the 28th day of January, 1941. From approximately the year 1933 up to and including January 8, 1941, the business and affairs of said corporation were actively carried on and conducted by said executive committee consisting of M. Maffei, L. R. Arnold and Peter Bercut. Said M. Maffei, L. R. Arnold and Peter Bercut were, and each of them was, familiar with all matters and things appertaining to the condition and affairs of the corporation and with the knowledge and consent and approval of its directors actively managed, controlled, carried on and conducted the business and affairs of Pacific Empire Holdings, Incorporated. During all of said time the defendants M. Maffei, Peter Bercut and L. R. Arnold took an active part in the management and direction of the affairs of Pacific Empire Holdings, Incorporated, and in the preparation of all of its financial statements and

reports sent to the stockholders of said corporation, or issued in connection with the operations of said corporation and in the supervision of the management and affairs of its subsidiaries, as hereinafter found.

IX.

Since on or about 1933 and up to and including on or about January 28, 1941, Pacific Empire Holdings, Incorporated, owned a majority of the outstanding capital stock of Pacific Empire Corporation, a California corporation. Said corporation, during all of said time, owned a substantial interest in Pacific National Bank of San Francisco, a National bank. During all of said time the active management of the affairs of said corporation [424] was conducted by and under the supervision of the defendants M. Maffei, Peter Bercut and L. R. Arnold. The said corporation, during all of said time, had a board of five directors, three of whom were the defendants M. Maffei, Peter Bercut and L. R. Arnold. During all of said time the defendant M. Maffei was president and defendant Peter Bercut was vice president of said corporation. During said period of time Pacific Empire Holdings, Incorporated, from time to time borrowed large sums of money from Pacific Empire Corporation. On or about January 28, 1941, Pacific Empire Holdings, Incorporated, was and still is indebted to Pacific Empire Corporation in a sum in excess of \$150,000.

X.

From about 1934 to and including about January 8, 1941, Merchants Ice and Cold Storage Com-

pany was a subsidiary of Pacific Empire Holdings, Incorporated, and during all of said period of time the active management of Merchants Ice and Cold Storage Company was under the supervision of and conducted by the executive officers of Pacific Empire Holdings, Incorporated. On January 8, 1941, and for some time prior thereto, the defendant L. R. Arnold was the president, general manager and one of the directors of Merchants Ice and Cold Storage Company, the defendant M. Maffei was vice president and one of the directors of Merchants Ice and Cold Storage Company and the defendant Peter Bercut was a director of Merchants Ice and Cold Storage Company.

XI.

From on or about 1934 to and including January 8, 1941, California Pacific Service, Inc., a California corporation, was a subsidiary of Pacific Empire Holdings, Incorporated, and the management of the affairs of California Pacific Service, Inc. during all of said time was under the active supervision of the [425] executive officers of Pacific Empire Holdings, Incorporated, and especially of the defendants M. Maffei, L. R. Arnold and Peter Bercut. From time to time Pacific Empire Holdings, Incorporated, borrowed large sums of money from California Pacific Service, Inc., and on January 8, 1941, Pacific Empire Holdings, Incorporated, was and still is indebted to California Pacific Service, Inc. in a sum in excess of \$30,000.

XII.

From on or about 1933 to January 8, 1941, Pacific Empire Holdings, Incorporated, through its ownership of a majority of the outstanding capital stock of Pacific Empire Corporation, owned a substantial interest in the Pacific National Bank of San Francisco, and from time to time the defendants M. Maffei, Peter Bercut and L. R. Arnold were members of the board of directors of said Pacific National Bank of San Francisco, representing the interests of Pacific Empire Holdings, Incorporated, and of its said subsidiary Pacific Empire Corporation in said bank. From time to time Pacific Empire Holdings, Incorporated, and Pacific Empire Corporation borrowed large sums of money from said Pacific National Bank of San Francisco, and on January 8, 1941, Pacific Empire Holdings, Incorporated and Pacific Empire Corporation were indebted to said bank in a sum in excess of \$50,000. On January 8, 1941, the defendants M. Maffei and Peter Bercut were directors of said Pacific National Bank of San Francisco representing the interests of Pacific Empire Corporation in said bank.

XIII.

The Court does hereby specially find that on or about January 28, 1941, the defendant Peter Bercut filed his written resignation as a director of Pacific Empire Holdings, Incorporated, with L. R. Arnold, then and there the vice president of Pacific [426] Empire Holdings, Incorporated. Said letter of res-

ignation bears date of March, 1940, but the court does hereby specially find that the said letter of resignation was not written, signed or delivered by the defendant Peter Bercut until on or about January 28, 1941, and that said resignation of Peter Bercut was at no time ever accepted by the board of directors of Pacific Empire Holdings, Incorporated, until on or about August 20, 1942. The court does further specially find that at no time prior to January 8, 1941, or subsequent thereto, did the defendant Peter Bercut ever resign as an officer or director of Pacific Empire Corporation, Merchants Ice and Cold Storage Company or Pacific National Bank of San Francisco. The Court does further specially find that M. Maffei, Peter Bercut and L. R. Arnold were the active officers and managers of the affairs and business of Pacific Empire Corporation, Merchants Ice and Cold Storage Company and California Pacific Service, Inc., each and all of them subsidiaries of Pacific Empire Holdings, Incorporated, up to and including January 8, 1941, and thereafter each and all of them were fully familiar with all of the affairs of said corporations and of the financial condition of Pacific Empire Holdings, Incorporated, Pacific Empire Corporation and Merchants Ice and Cold Storage Company.

XIV.

On December 31, 1940, the By-Laws of Pacific Empire Holdings, Inc., then in full force and effect, provided as follows:

Article IX of said By-Laws, dealing with the office of the president, states:

“Section 1. Nature of Office. The president shall be the chief executive officer and head of the corporation and shall have general control and management of its business and affairs subject to the control of the board of directors.”

Article X of said By-Laws, dealing with the office of vice president, states:

“The vice president in the absence or inability to act of the president is vested with all the powers and shall perform all the duties of the [427] president. If there be more than one vice president, they shall be numbered and each shall act in the absence or inability to act of the president and of all vice presidents preceding him in number. In such acts and in the execution of writings by such vice presidents, it shall not be necessary to recite the absence or inability of any preceding officer to act.”

Article XI of said By-Laws, dealing with the office of Secretary, states:

“Section 1. Nature of Office. The secretary *shall ex-officio*, secretary and clerk of the board of directors and secretary of all stockholders' meetings and of the executive and of all other committees. He shall attend *to* all their sessions and shall record all votes and minutes of their proceedings in a book or books kept for that purpose.

“Section 2. Notices. He shall give or serve all notices required by law or the order of the president and all notices required of all meetings of the stockholders, directors and committees when not otherwise legally given. In case of his absence, inability, refusal or neglect so to do, then such notices may be given or served by any person thereunto directed by the president.

“Section 3. Certificates of Stock. He shall keep a book of blank certificates of stock, and shall fill out and countersign all certificates of stock issued, and make entries evidencing such issuance on the margin of said book.

“Section 4. Corporate Seal. He shall keep the corporate seal and he shall affix said seal to all papers requiring the affixation thereof, including certificates of stock.

“Section 5. Transfer Book. He shall keep a transfer book and a stock ledger in debit and credit form showing the number of shares issued to and transferred by any stockholder and the dates of such issuance and transfer.

“Section 6. Account Books. He shall keep proper account books, in debit and credit form, of all moneys received by or paid out by the corporation. He shall as often as required by the president make and file in the office of the company a trial balance sheet and shall as often as required make and file in the office of the company a balance sheet showing profits and

losses of the company as appear by its books.

“Section 7. General Duties. He shall in general perform all other duties required by the president, directors or committees.” [428]

Article VI of said By-Laws, dealing with the duties of directors, sub-section 6 thereof, states:

“Management. The board of directors shall manage and control the business of the corporation.”

Article VII of said By-Laws, dealing with the duties of the executive committee, states:

“Section 1. Appointment. The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2. Powers. Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. Removal. Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors.”

XV.

On or about December 31, 1940, the defendants Peter Bercut, M. Maffei and L. R. Arnold, who then and there were officers and directors of Pacific Empire Holdings, Incorporated, and members of its executive committee and in active supervision over the affairs of said corporation and its subsidiaries Pacific Empire Corporation, Merchants Ice and Cold Storage Company and California Pacific Service, Inc., and who then and there knew that a judgment had been obtained by the United States of America against Pacific Empire Holdings, Incorporated, as hereinbefore found by the court, and that execution on said judgment was imminent, and who then and there knew that Pacific Empire Holdings, Incorporated, was not able to satisfy the said judgment or bond against the same or appeal therefrom, and who then and there knew that Pacific Empire Holdings, [429] Incorporated, and its subsidiaries, were in imminent danger of being declared insolvent because of its inability to pay or meet its obligations, agreed among themselves, without consulting the board of directors of Pacific Empire Holdings, Incorporated, or any of its subsidiaries, to the effect that the defendant Peter Bercut should purchase, for the sum of \$35,000 the 12,493 shares of preferred stock and 65,863 shares of common stock of Merchants Ice and Cold Storage Company then and there owned by Pacific Empire Holdings, Incorporated, of which sum of \$35,000 Pacific Empire Holdings, Incorporated, was to retain \$10,000,

and \$25,000 was to be paid by it, simultaneously with the transaction to Merchants Ice and Cold Storage Company, on account of certain indebtedness then and there asserted to be owing by Pacific Empire Holdings, Incorporated to Merchants Ice and Cold Storage Company.

XVI.

The court does hereby specifically find that at said time, to-wit, on or about December 31, 1940, the said 12,493 shares of preferred stock of Merchants Ice and Cold Storage Company were carried and valued on the books of Pacific Empire Holdings, Incorporated at the sum of \$123,456.66, and the said 65,863 shares of common stock of Merchants Ice and Cold Storage Company were carried and valued on the books of Pacific Empire Holdings, Incorporated, at the sum of \$545,906.81. The court does further specifically find that said valuation was based upon the audited statements of Merchants Ice and Cold Storage Company prepared by John F. Forbes & Co., certified public accountants, reflecting the balance sheet and operations of said company for the year ending December 31, 1939.

XVII.

The court does further specifically find that on or about June 30, 1940, the defendants M. Maffei, L. R. Arnold and [430] Peter Bercut, then and there constituting the officers and executive committee of Pacific Empire Holdings, Incorporated, issued a

financial report of Pacific Empire Holdings, Incorporated, to their stockholders reflecting the financial condition of said company as of December 31, 1939, and that in said communication to the stockholders the said shares of Merchants Ice and Cold Storage Company were declared to be worth the sums hereinbefore found, and that the financial condition of Merchants Ice and Cold Storage Company was declared to be considerably improved over that of the previous years and that it was hoped that Merchants Ice and Cold Storage Company would soon go on a dividend paying basis.

XVIII.

The court does hereby specifically find that upon said agreement having been made between the defendants M. Maffei, L. R. Arnold and Peter Bercut, as hereinbefore found, the said defendants purported to execute a written agreement, which agreement so executed was as follows:

“January 8, 1941.

Mr. Peter Bercut
739 Market Street
San Francisco, Cal.

Dear Mr. Bercut:

The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the controlling shares of stock of Merchants Ice and Cold Storage Company, now owned by this corporation.

The purchase price, as agreed to be paid by Peter Bercut, is \$35,000, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common Stock.

It is agreed by this corporation that out of the proceeds of this sale, to-wit, \$35,000, the sum of \$25,000 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining, the sum of \$6,000 is to be remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank. [431]

It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4,100 is to be delivered to Peter Bercut when this obligation is paid.

It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two

years from date hereof. It is understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Incorporated, in connection with the 20,000 shares of Common stock hereinabove referred to are not assignable.

Yours very truly,

PACIFIC EMPIRE HOLDINGS,
INCORPORATED

By M. MAFFEI, Pres.

By L. R. ARNOLD, Secy.

Agreed and Accepted:

PETER BER CUT."

XIX.

The court does hereby specifically find that neither prior to nor at any time subsequent to the execution of said agreement between said parties was there ever held any meeting of the board of directors or of the executive committee of Pacific Empire Holdings, Incorporated for the purpose of passing upon, approving, ratifying or confirming

the execution of said agreement by said persons for and on behalf of Pacific Empire Holdings, Incorporated, other than as hereinbefore found by the court.

XX.

The court does hereby find that at said time the board of directors of Pacific Empire Holdings, Incorporated, consisted of the following members:

M. Maffei, A. A. Heer, L. R. Arnold, Luigi Giachino, Webb Richards, Peter Bercut, T. M. Ryerson. [432]

XXI.

The court further finds that at no time were any of the directors of Pacific Empire Holdings, Incorporated, called into session for the purpose of passing upon, approving, ratifying or confirming the said transaction, other than as hereinafter found by the court. The court does further find that at no time were directors Webb Richards, T. M. Ryerson, Luigi Giachino or A. A. Heer ever consulted with respect to the advisability of entering into said transaction or with respect to approving, ratifying or affirming the said transaction other than as hereinafter found. The court does further find that prior to December 31, 1940, the defendants M. Maffei and L. R. Arnold had been repeatedly advised by business interests not connected with Pacific Empire Holdings, Incorporated, that in the event it was decided to dispose of said shares of Merchants Ice and Cold Storage Company that said business interest would be interested in sub-

mitting bids therefor, and the court does further find that prior to entering into said transaction with said Peter Bercut no effort was made by any of the said defendants to ascertain whether or not any other person, firm or corporation would be interested in purchasing the said shares of Merchants Ice and Cold Storage Company agreed to be sold to the defendant Peter Bercut for a price higher than paid by Peter Bercut. The court does further find that the stockholders of Pacific Empire Holdings, Incorporated and Pacific Empire Corporation at no time were ever advised of the sale of said shares of stock to Peter Bercut, and at no time were any of the stockholders of said corporation ever called into session for the purpose of approving, ratifying and confirming the said transaction. The court further finds that the said transaction was carried on between said parties in a secret and hasty manner, and that after the said transaction had taken place, upon [433] inquiry having been made by directors, creditors and stockholders the said defendants M. Maffei and L. R. Arnold did not disclose to said inquiring persons the true nature of said transaction. The court does further specifically find that at said time, to-wit, on or about December 31, 1940, Pacific Empire Holdings, Incorporated, was indebted to William F. Morrish, then and there Chairman of the Board of Directors of Merchants Ice and Cold Storage Company, in a sum of money, to-wit: \$3,000, which the said company had borrowed from said William F. Morrish and as security

therefor had pledged with said William F. Morrish 1500 shares of said common stock and 150 shares of said preferred stock of Merchants Ice and Cold Storage Company, and the court does hereby further specifically find that the said William F. Morrish deemed the said security adequate protection for his said loan. As a result of the transaction hereinbefore found Pacific Empire Holdings, Incorporated, was rendered insolvent and incapable of meeting its obligations.

XXII.

The court further finds that on August 20, 1942, a special meeting of the board of directors of Pacific Empire Holdings, Incorporated, was held for the purpose of passing upon a proposal looking towards consent to the appointment of an Equity Receiver for the Company. At said meeting the nature of the transaction had between and conducted by defendants M. Maffei, L. R. Arnold and Peter Bercut was discussed, and at said meeting the directors of the corporation, for the first time, were advised of the nature and character of the transaction. The court further finds that at said meeting the directors were advised that certain stockholders and creditors had threatened to file suit in the Chancery Court of the State of Delaware for the purpose of appointing a receiver for the company, and at said meeting the [434] said directors were advised by A. J. Scampini, Esq., one of the creditors of the company, and attorney at law, who

then and there had been consulted by the officers of the company with respect to the threatened litigation in Delaware, that in his opinion the said transaction had with Peter Bercut was illegal and that it should be repudiated by the directors, and that the proper party to repudiate the said transaction and to prosecute the claim of the company against the defendants responsible for the said transaction was an Equity Receiver. The court further finds that at said meeting the resignation of the director Peter Bercut was accepted, and all of the remaining directors then and there or thereafter in writing approved and consented to the appointment of an Equity Receiver in the State of Delaware to the end and purpose that such receiver might proceed to disaffirm the said transaction and to bring suit against the parties responsible therefor, for the purpose of recovering said shares of stock for the company.

XXIII.

The court further finds that the said meeting of August 20, 1942, was the first meeting of the board of directors of Pacific Empire Holdings, Incorporated, held after the said transaction and the first time when the board of directors of said company were fully advised of its nature and character and given the opportunity to pass upon the same. That upon the appointment of plaintiff herein, as Receiver in Equity for Pacific Empire Holdings, Incorporated, the said transaction with Peter Bercut

was repudiated by the receiver, in writing. Thereupon, the above entitled action was instituted by said receiver for the purpose of recovering the said shares of stock of Merchants Ice and Cold Storage Company. The court further finds that during [435] the progress of the action the said receiver offered to restore to the defendant Peter Bercut the consideration paid by him for the said shares of stock but that said offer was refused by the defendant Peter Bercut. The court further finds that said plaintiff made demand upon defendant Peter Bercut for the return of the said shares of stock acquired by him pursuant to the said agreement dated January 8, 1941, but that said demand was refused by the defendant Peter Bercut. The court further finds that defendant, Henri Bercut asserts an interest in the said shares but that the said interest was acquired by the defendant Henri Bercut through Peter Bercut with full knowledge of the nature and circumstances of the transaction had by and between the defendants Peter Bercut, M. Maffei and L. R. Arnold. The court further finds that during all of the period of time intervening between January 8, 1941, and August 20, 1942, the defendants M. Maffei and L. R. Arnold controlled the activities of Pacific Empire Holdings, Incorporated and directed the affairs of said company without consultation with its board of directors, and wilfully suppressed the facts, nature and circumstances of said transaction from the board of directors and stockholders of the said company. The court fur-

ther finds that as a result of the said transaction had by and between the said defendants pursuant to said agreement dated January 8, 1941, Pacific Empire Holdings, Incorporated, was deprived of substantially all of its assets, and that the said 78,358 shares of stock of Merchants Ice and Cold Storage Company transferred to Peter Bercut as the result of said transaction represented substantially all of the assets of Pacific Empire Holdings, Incorporated.

XXIV.

The court further finds that at no time either prior or [436] subsequent to the said transaction bearing date of January 8, 1941, was there ever any resolution adopted by either the executive committee of Pacific Empire Holdings, Incorporated, or by its board of directors or its stockholders at any meeting legally and lawfully assembled for the purpose of authorizing the officers of the company to execute the said agreement dated January 8, 1941, or for the purpose of authorizing, ratifying or confirming the said transaction had by and between the said defendants M. Maffei, L. R. Arnold and Peter Bercut dated January 8, 1941.

XXV.

The Court further finds that Pacific Empire Corporation is not a necessary party to the determination of this action.

XXVI.

The Court further finds that plaintiff is not barred by any laches or by any statute of limitation

in the prosecution of [437] this action and is not estopped from denying and questioning the validity of said contract and transaction.

XXVII.

The Court further finds that plaintiff has capacity to sue in this Court and to prosecute this action.

And as Conclusions of Law from the foregoing findings of fact the Court concludes as follows:

CONCLUSIONS OF LAW

1. Plaintiff is entitled to judgment against the defendants Peter Bercut and Henri Bercut adjudging and decreeing that the 12,493 shares of preferred stock and 65,863 shares of common stock of Merchants Ice and Cold Storage Company, acquired by Peter Bercut as the result of the said transaction dated January 8, 1941, are and at all times have been the property of Pacific Empire Holdings, Incorporated, and of plaintiff herein, its receiver.

2. In all matters and things appertaining to the said shares of stock the said defendants have been and now are the trustees for plaintiff, and the said defendants are unlawfully in possession of the said shares and that plaintiff is entitled to judgment for the delivery of said shares.

3. That the defendants Peter Bercut and Henri Bercut are not entitled to judgment against plaintiff on the cross-complaint filed herein against plaintiff.

4. That each and all of the parties hereto pay their own costs of suit herein incurred.

And it is ordered and directed that judgment be entered accordingly.

Dated: San Francisco, California, July, 1943.

.....
Judge

[Endorsed]: Lodged July 23, 1943. [438]

—————

[Title of District Court and Cause.]

EXCEPTIONS OF PLAINTIFF TO THE
FINDINGS OF FACT AND CONCLUSIONS
OF LAW PROPOSED BY THE DEFEND-
ANTS PETER BERCUT AND HENRI
BERCUT

Now comes Thomas H. Wingate as receiver in equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, the plaintiff herein, and takes exception to the Findings of Fact and Conclusions of Law submitted and proposed by the defendants Peter Bercut and Henri Bercut, and as grounds for such exceptions plaintiff states:

I.

Finding III proposed by the said defendants is erroneous and contrary to and not supported by the evidence, in that the [439] evidence adduced at the trial conclusively discloses that the defendant Peter Bercut was a director, vice president and member of the executive committee of Pacific Empire Hold-

ings, Incorporated, until August 20, 1942, and that the said defendant, together with the defendants M. Maffei and L. R. Arnold, actively managed, supervised and conducted the affairs of said corporation and of its subsidiaries from its inception on or about 1931 to on or about January 8, 1941. Plaintiff further alleges that the evidence conclusively discloses that defendant Peter Bercut, in all matters and things of any substantial nature appertaining to the conduct of the affairs and business of said corporation and of its subsidiaries, Pacific Empire Corporation, Merchants Ice and Cold Storage Company, and California Pacific Service, Inc., was consulted by the defendants M. Maffei and L. R. Arnold and he participated in the directors and executive committee meetings and approved, without objection, all of the acts and deeds of M. Maffei and L. R. Arnold and of said executive committee during all of said period of time. The evidence further conclusively discloses that said defendant Peter Bercut at no time ever resigned as an officer and director of Pacific Empire Corporation and as a director of Merchants Ice and Cold Storage Company, both of these companies being subsidiaries of Pacific Empire Holdings, Incorporated. The evidence further discloses that said defendant Peter Bercut, together with the defendants M. Maffei and L. R. Arnold, as the executive officers of Pacific Empire Holdings, Incorporated, and constituting its executive committee, prepared and supervised

all financial statements and reports of said corporation mailed to its stockholders during all of said period.

II.

Plaintiff takes exception to Finding IV of said defendant [440] and states that there is no evidence in the record to sustain a finding by the court that the value of the 12,493 shares of preferred stock and the 65,863 shares of the common stock of Merchants Ice and Cold Storage Company, owned by Pacific Empire Holdings, Incorporated, on January 8, 1941, had a reasonable value of only \$35,000, and in this connection plaintiff states that the evidence conclusively proves that the reasonable value of said shares as a block at said time was not less than \$250,000.

Plaintiff further takes exception to the finding contained therein to the effect that none of said shares of Merchants Ice and Cold Storage Company were, on January 8, 1941, on pledge with Pacific Empire Corporation, and in this connection plaintiff states that the evidence in the record discloses a pledge of a substantial portion of said shares to said corporation in the year 1935, and no evidence was thereupon offered by either side with respect to whether or not the said pledge was ever satisfied. In this connection plaintiff further alleges that said finding is not an ultimate fact to be found by the court in the cause since Pacific Empire Corporation is not a party to the cause and its interests and

rights in said shares cannot be judicially passed upon by this court without its presence in the cause.

Plaintiff further takes exception to the finding contained therein to the effect that all borrowings by Merchants Ice and Cold Storage Company from Pacific Empire Holdings, Incorporated, had been paid in full on January 8, 1941, and that Pacific Empire Holdings, Incorporated, was, on said date, indebted to Merchants Ice and Cold Storage Company, and as grounds for this exception this plaintiff states that such a finding is not one of ultimate fact and that the legality of any claim by Merchants Ice and Cold Storage Company against Pacific Empire Holdings, Incorporated, [441] arising out of any such alleged indebtedness, cannot be passed upon by this court and the action is not between Pacific Empire Holdings, Incorporated and Merchants Ice and Cold Storage Company.

III.

Plaintiff excepts to Finding V and states that said finding is contrary to the evidence in that the evidence conclusively proves that the defendant Peter Bercut was an officer, to-wit, vice president, director and member of the executive committee of said company on January 8, 1941.

IV.

Plaintiff takes exception to Finding VI on the ground that it is not a complete finding of fact

because the evidence discloses that the portion of the By-Laws of Pacific Empire Holdings, Incorporated, read into the record included sections other than those set forth in said Finding VI, and said finding is not a complete finding of the fact with respect to said By-Laws.

V.

Plaintiff takes exception to Finding VII and states that said finding is contrary to the evidence and contrary to law in that the action of M. Maffei and L. R. Arnold, in executing the agreement with Peter Bercut dated January 8, 1941, was not within the scope and course of their authority, but on the contrary, was without the course and scope of their authority, and the said parties had no authority to bind Pacific Empire Holdings, Incorporated by their execution of the said agreement for and on behalf of the said corporation.

Plaintiff excepts to the finding in said Finding VII to the effect that said agreement of sale dated January 8, 1941, was in all respects fair and equitable to Pacific Empire Holdings, Incorporated, and was entered into in good faith after lengthy [442] negotiations at arms length by and between said corporation acting through independent and disinterested officers and directors, and said Peter Bercut, and upon full disclosure of all facts relating thereto, and in this connection plaintiff states that such a finding is a mere conclusion of law; that the said agreement of January 8, 1941, was not fair

and equitable to Pacific Empire Holdings, Incorporated, and the same was not entered into in good faith and at arms length by and between said corporation, and said Peter Bercut, but on the contrary was the result of secret, nefarious and hasty negotiations between the defendants M. Maffei, L. R. Arnold and Peter Bercut, without the knowledge of the board of directors of said company, and without any authority on the part of said persons to so engage in any such transaction.

Plaintiff further states that the finding therein to the effect that the sum of \$35,000 was a fair, reasonable and proper price for said shares is not supported by the evidence, and is irrelevant and immaterial for the reason that the corporation as such never engaged in any transaction with Peter Bercut and the contract dated January 8, 1941, is not the corporate act of Pacific Empire Holdings, Incorporated. Plaintiff states that the said contract is not binding upon said corporation and was and is not the corporate act of Pacific Empire Holdings, Incorporated.

Plaintiff further excepts to the finding found therein to the effect that at the time of the said purchase, to-wit, on or about January 8, 1941, none of the said shares acquired by Peter Bercut pursuant to said agreement were in pledge to Pacific Empire Corporation for any sum, and in this connection plaintiff states that the evidence does not support such a finding, and that such a finding is irrelevant and immaterial and not one of [443] ulti-

mate fact and not a proper finding to be made herein, for the reason that Pacific Empire Corporation is not a party to this cause.

VI.

Plaintiff excepts to Finding VIII on the ground that it is contrary to law, not supported by any evidence and outside the jurisdiction of this court. Plaintiff further excepts to said finding on the ground that the transaction between the defendants M. Maffei, L. R. Arnold and Peter Bercut, dated January 8, 1941, was not the act and deed of Pacific Empire Holdings, Incorporated, but was the unauthorized and illegal act of the defendants, M. Maffei, L. R. Arnold and Peter Bercut, then and there acting without authority to bind the corporation and for their own personal benefit, contrary to the interests of the corporation of which they were trustees. Plaintiff further excepts to said finding on the ground that there is no evidence in the record proving that plaintiff is in possession of any shares of Merchants Ice and Cold Storage Company belonging to plaintiff, and on the further ground that no affirmative relief is available to said defendants as against plaintiff other than in the course of administration.

VII.

Plaintiff excepts to Finding IX on the ground that said finding is contrary to the evidence, and further states that the evidence conclusively dis-

closes that as the result of said transaction with Peter Bercut, dated January 8, 1941, Pacific Empire Corporation and Pacific Empire Holdings, Incorporated, were both rendered insolvent and unable to meet its indebtedness as it matured.

VIII.

Plaintiff excepts to Finding X, and states that said finding is contrary to the evidence in that Merchants Ice and Cold Storage Company was not in an insolvent condition on January 8, 1941, but on the contrary was in a solvent condition with a net worth of \$1,415,725.00.

Plaintiff further excepts to the said finding on the [444] ground that it is incompetent, irrelevant, immaterial, not a finding of ultimate fact, not supported by the evidence, and constitutes pure conclusions.

Plaintiff further excepts to the said finding on the ground that no estoppel or laches are available in behalf of the defendants against plaintiff because of the wrongful acts and conduct of the said defendants at all times immediately prior to January 8, 1941, and subsequent to said date, up to the date of the appointment of plaintiff as receiver.

Plaintiff further excepts to said finding, and especially to the finding found therein to the effect that Pacific Empire Holdings, Incorporated, and plaintiff herein, acquiesced and consented to the acts and conduct of Peter Bercut in reliance upon said contract of sale dated January 8, 1941, and in this connection plaintiff states that Pacific Empire

Holdings, Incorporated, and plaintiff at no time ever acquiesced or consented to any act or conduct on the part of Peter Bercut for the reason that up to and including August 20, 1942, said company was dominated, controlled and managed by the defendants M. Maffei and L. R. Arnold who were parties to the said agreement with Peter Bercut, and plaintiff, upon his appointment as receiver, immediately repudiated said transaction and instituted the present cause.

IX.

Plaintiff excepts to finding XI on the ground that the evidence conclusively discloses that plaintiff offered to restore the consideration paid by Peter Bercut for the said shares prior to the trial of the above cause, as well as in Open Court, but at no time did the defendant Peter Bercut ever accept the said offer. [445]

X.

Plaintiff excepts to Finding XII and XIII for the reason that the said findings and each of them are pure conclusions of law and not findings of ultimate facts, and for the further reasons that said findings are not supported by, but are contrary to the evidence.

XI.

Plaintiff further excepts to the conclusions of law proposed by the said defendants, and as grounds for such exceptions states that the said conclusions are not warranted by either the evidence or by proper finding, and they are contrary to law.

Wherefore, plaintiff proposes the attached amendments to the findings and conclusions of law and asks that said amended findings of fact and conclusions of law, as proposed herein, be made the findings of fact and conclusions of law of the court.

Dated: July 22, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff

[Endorsed]: Filed July 23, 1943. [446]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 6th day of July, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Michael J. Roche, D. J.

[Title of Cause.]

This case having been heretofore heard and submitted, and being now fully considered, it is by the Court ordered that judgment be entered herein in favor of the defendants upon findings of fact and

conclusions of law, the respective parties to pay their own costs. [447]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause coming on regularly to be heard on the 20th day of April, 1943, before the above entitled Court, without a jury, Honorable Michael J. Roche presiding, a jury trial not having been demanded; plaintiff appearing in Court by his attorneys, A. J. Scampini, L. F. Mahan, Howard Ellis and C. T. Hubner; defendants, Peter Bercut and Henri Bercut, appearing in Court by their attorneys, Louis H. Brownstone and George M. Naus; defendants, M. Maffei and L. R. Arnold, appearing [448] in Court by their attorney, J. A. Pardini; the above entitled cause having been dismissed in open Court as to all other defendants; and oral and documentary evidence having been introduced on April 20, 1943 and the cause having been duly and regularly continued to and tried on successive days thereafter and oral and documentary evidence having been introduced on said days, and the matter having been briefed by counsel for all parties and having been submitted to this Court for decision, and the Court being fully advised in the premises now finds:

FINDINGS OF FACT

I.

That this Court has jurisdiction of the above entitled cause. Plaintiff was at the time of the commencement of this action and still is a citizen and resident of the State of Delaware. Pacific Empire Holdings, Incorporated at all times was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware. Each of the defendants named in the complaint on file herein was at the time of the commencement of this action, ever since has been, and still is a citizen and resident of the State of California and resides within the jurisdiction of this Court. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Pacific Empire Holdings, Incorporated, a Delaware corporation, has its principal office in the City and County of San Francisco, State of California, and at all times has conducted its principal activities in said city and state. On the 31st day of August, 1942, in the Court of Chancery of the State of [449] Delaware in and for New Castle County, in that certain action of Rebecca Tanzer and Elizabeth Wilhelm, complainants, vs. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, defendant, upon proceedings being duly had in said Court pursuant to provisions of Section 4407 of the Revised Code of Delaware of

1935, the said Pacific Empire Holdings, Incorporated was adjudged and decreed to be insolvent in the equity sense, and Thomas H. Wingate, the plaintiff herein, of the City of Wilmington, State of Delaware, was appointed Receiver of Pacific Empire Holdings, Incorporated with full power to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts due and belonging to the said Pacific Empire Holdings, Incorporated and with power to prosecute and defend in the name of said Pacific Empire Holdings, Incorporated, or otherwise, all claims and suits. Said Thomas H. Wingate has qualified as such receiver of and for Pacific Empire Holdings, Incorporated and he is now the duly appointed, qualified and acting receiver in equity for said corporation.

Under and pursuant to Section 4408 of the Revised Code of Delaware of 1935, now in full force and effect, said Thomas H. Wingate, as such receiver, has been and now is vested with the title of said Pacific Empire Holdings, Incorporated, a corporation, to all its books, papers and documents, interests in patents, patent rights, copyrights, and trade-marks, rights of action arising upon contract or from the unlawful taking or detention of or injury to property, real, personal or mixed, of whatever nature, kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware.

III.

Continuously since approximately the year 1931 up to [450] and including August 20, 1942 and thereafter to the date hereof, M. Maffei and L. R. Arnold were, and each of them was a director and member of the Executive Committee of Pacific Empire Holdings, Incorporated, a corporation, and M. Maffei was President and L. R. Arnold was Vice-President and Secretary of said corporation. On or about February 15, 1933, defendant, Peter Bercut, was elected and became a Director of said corporation. On or about February 19, 1935, defendant, Peter Bercut, was elected and became a member of the Executive Committee of said corporation and on or about March 28, 1933, defendant, Peter Bercut, was elected and became a Vice-President of said corporation. Said Peter Bercut continued as a Director, Vice-President and member of the Executive Committee of said corporation until his resignation as such director, officer and member on or about the first day of May, 1940. From February 19, 1935 to on or about May 1, 1940, the Executive Committee of said corporation consisted of M. Maffei, L. R. Arnold and Peter Bercut. From and after May 1, 1940, to the date hereof the Executive Committee of said corporation consisted of M. Maffei and L. R. Arnold. From approximately the year 1931 up to and including August 20, 1942, the business and affairs of said corporation were actively carried on and conducted by M. Maffei and L. R. Arnold, the executive officers of said cor-

poration. Said M. Maffei and L. R. Arnold were, and each of them was, familiar with all matters and things appertaining to the condition and affairs of the corporation and with the knowledge and consent of its Directors actively managed, controlled, carried on and conducted its business and affairs. During all of said time, defendant, Peter Bercut, took no active part in the management or direction of the affairs of said corporation or the preparation of any financial statements in connection therewith or appertaining thereto. [450-A]

IV

At various times subsequent to 1931 to and including March 15, 1940, Pacific Empire Holdings, Incorporated acquired ownership of shares of common and preferred stock of Merchants Ice & Cold Storage Company, a corporation conducting an ice and cold storage business at San Francisco, California, at prices varying upwards from 12½¢ per share for common stock and \$1.00 per share for preferred stock. The total cost to Pacific Empire Holdings, Incorporated for all of said shares so acquired did not exceed the sum of \$250,000.00. On December 31, 1940 Pacific Empire Holdings, Incorporated was the owner of 78,358 shares of capital stock of Merchants Ice & Cold Storage Company, consisting of 12,493 shares of preferred stock and 65,863 shares of common stock. On said date and on January 8, 1941 the reasonable value of said shares was not in excess of the sum of \$35,000.00. None

of said shares were in pledge to Pacific Empire Corporation, a California corporation, as security for notes and accounts payable to Pacific Empire Corporation in the amount of \$136,855.34, or in any amount, or at all.

From 1931 to January 8, 1941, on occasions Pacific Empire Holdings, Incorporated loaned various amounts of money to Merchants Ice & Cold Storage Company and all of said loans were repaid in full by said Merchants Ice & Cold Storage Company. Similarly, during said period Merchants Ice & Cold Storage Company loaned various sums of money to Pacific Empire Holdings, Incorporated and on January 8, 1941 a large sum of money was due, owing and unpaid from Pacific Empire Holdings, Incorporated to Merchants Ice & Cold Storage Company, in addition to substantial sums owed to other persons by Pacific Empire Holdings, Incorporated.

In addition to the shares of Merchants Ice & Cold Storage [451] Company, on December 31, 1940 and on January 8, 1941 Pacific Empire Holdings, Incorporated owned 47½% of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating a laundry at Bakersfield, California, and said shares had a substantial value. On said date said corporation also owned 52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation, and said shares had substantial value.

V

On or about January 8, 1941, in accordance with law and the Articles and By-laws of Pacific Empire Holdings, Incorporated, the said corporation had a Board of Directors consisting of an authorized number of seven Directors. At said time the Board consisted of six elected and serving Directors, namely, M. Maffei, A. A. Heer, Jr., L. R. Arnold, Luigi Giachino, Webb Richards and T. M. Ryerson. At said time, in accordance with law and the Articles and By-laws of Pacific Empire Holdings, Incorporated, said corporation had an Executive Committee consisting of an authorized number of three Directors and at said time, two of the Directors, namely, M. Maffei and L. R. Arnold, were duly elected, qualified and acting members of said Executive Committee.

VI

On or about January 8, 1941 the following By-law of Pacific Empire Holdings, Incorporated, among others, was in full force and effect.

“Article VII. Executive Committee

Section 1. Appointment

The directors may appoint an executive committee from their own number to consist of such number as they shall see fit. [452]

Section 2. Powers

Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors

when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. Removal

Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors."

VII

On or about January 8, 1941 Pacific Empire Holdings, Incorporated by and through its President, M. Maffei, and its Secretary, L. R. Arnold, acting within the course and scope of their authority for and on behalf of said corporation, sold to Peter Bercut for and on behalf of himself and Henri Bercut, and Peter Bercut for and on behalf of himself and his brother, Henri Bercut, purchased of and from Pacific Empire Holdings, Incorporated, for the sum of \$35,000.00, 78,358 shares of capital stock of Merchants Ice & Cold Storage Company, a California corporation, consisting of 12,495 shares of preferred stock and 65,863 shares of common stock of said corporation. Said agreement of sale was in writing and was in all respects fair and equitable to Pacific Empire Holdings, Incorporated and was entered into in good faith after lengthy negotiations, at arm's length, by and between the

said corporation acting through independent and disinterested officers and directors and the said Peter Bercut, and upon a full disclosure of all facts relating thereto. At said time and at all times subsequent to May 1940, defendant, Peter Bercut, was [453] not an officer or director or member of the Executive Committtee of said corporation.

The price paid for said shares, to-wit, the sum of \$35,000.00, was a fair, reasonable and proper price for said shares. Said contract, and all of the terms thereof, was in all respects beneficial, fair and equitable to said corporation, and said contract was entered into for and on behalf of Pacific Empire Holdings, Incorporated under proper corporate authority by officers and directors and its executive committee duly authorized to act for and on behalf of said corporation and acting in accordance with law and its Articles and By-laws, honestly, independently and in good faith. Said contract was and is fully binding upon said corporation and is its corporate act. Subsequent to the execution of said contract, the Board of Directors of said corporation at a meeting duly and regularly called and held, did not disaffirm the said contract. On and about January 8, 1940, the shares of Merchants Ice & Cold Storage Company purchased by defendant, Peter Bercut, from Pacific Empire Holdings, Incorporated, as aforesaid, were reasonably worth a sum not in excess of \$35,000.00.

The said shares were purchased by Peter Bercut for and on behalf of himself and Henri Bercut

and for and on behalf of no other person or persons, and are now held by Peter and Henri Bercut for themselves and for no one else. Defendants, M. Maffei and L. R. Arnold did not then have, never have had, and do not now have, any interest in the shares so purchased, or any part thereof. None of the defendants, or any other person, firms, or corporations conspired and confederated together to purchase the said shares for a nominal consideration through the power, influence or position of any person or persons. There is no [454] evidence of a conspiracy in respect to any matters or things alleged in the complaint in file herein or in any other respect, or at all. At the time of the said purchase, none of said shares were in pledge to Pacific Empire Corporation for any sum, or amount, or at all.

VIII

On or about January 8, 1941 defendant, Peter Bercut, paid to Pacific Empire Holdings, Incorporated the sum of \$35,000.00., the full purchase price for the shares of Merchants Ice & Cold Storage Company and said Peter Bercut has fully performed each and all of the terms, covenants, agreements and conditions required to be performed by him under the terms, provisions and conditions of the agreement of sale dated January 8, 1941. From and out of the sum of \$35,000.00 paid to Pacific Empire Holdings, Incorporated for said shares, Pacific Empire Holdings, Incorporated paid \$25,000.00 to Merchants Ice & Cold Storage Company on ac-

count of an indebtedness owing by it to the Merchants Ice & Cold Storage Company substantially in excess of the amount of \$25,000.00.

Pursuant to said agreement, the said corporation delivered to Peter Bercut on account of the shares so sold, 6,670 shares of preferred stock and 62,341 shares of common stock of Merchants Ice & Cold Storage Company. In order to obtain possession of $5,516\frac{2}{3}$ shares of preferred stock so sold and at the express instance and request of Pacific Empire Holdings, Incorporated, on or about April 1, 1941 defendants, Peter Bercut and Henri Bercut, were compelled to, and did, advance and expend the sum of \$3,950.00 in payment of a claim against Pacific Empire Holdings, Incorporated, secured by a pledge of said $5,516\frac{2}{3}$ shares, and the said corporation promised and agreed to repay said sum to Henri Bercut. Subsequent to January 8, 1941 and as aforesaid, Pacific [455] Empire Holdings, Incorporated delivered to Peter Bercut $12,186\frac{2}{3}$ shares of preferred stock and 62,341 shares of common stock of Merchants Ice & Cold Storage Company. Pursuant to the terms and provisions of the agreement dated January 8, 1941 the said corporation has failed and refused to deliver to Peter Bercut the balance of $308\frac{1}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company required to be delivered thereunder.

Defendants, Peter Bercut and Henri Bercut, and each of them, have demanded payment of the sum

of \$3,950.00 and delivery of 308 $\frac{1}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company of and from Pacific Empire Holdings, Incorporated and of and from plaintiff but said corporation and said plaintiff have failed and refused to pay said sum, or any part thereof, save and except the sum of \$100.00, or to deliver said shares, or any part thereof, to said defendants, or either of them.

IX

The sale of said shares of Merchants Ice & Cold Storage Company, as aforesaid, did not render Pacific Empire Holdings, Incorporated

~~Corporation~~ insolvent or unable to meet its debts or other obligations and was not in fraud of its stockholders and creditors or its stockholders or creditors. The financial condition of said corporation was due to causes other than the sale of said shares.

X

On or about January 8, 1941, Merchants Ice & Cold Storage Company was in an insolvent condition; it had no funds with which to meet its payrolls and was about to collapse financially, and said facts and circumstances were fully known to Pacific Empire Holdings, Incorporated and its officers and directors. [456] The execution of the contract of purchase and sale of shares of Merchants Ice & Cold Storage Company by Pacific Empire Holdings, Incorporated to Peter Bercut under date of

January 8, 1941 and the facts and circumstances relating thereto were at said time known to Pacific Empire Holdings, Incorporated, its officers and directors and were a matter of public knowledge in San Francisco; and the sum of \$35,000.00 paid for said shares by Peter Bercut was a fair, reasonable and proper price for said shares. Upon the execution of said contract and in reliance thereon, Peter Bercut assumed the presidency and management of the Merchants Ice & Cold Storage Company and has continuously since the execution of said contract of date January 8, 1941 devoted himself and his financial resources to the rehabilitation and development of the business of Merchants Ice & Cold Storage Company. As a result thereof, Merchants Ice & Cold Storage Company has and had at and about the time of the filing of the complaint herein, a large and active business and is and was then operating upon a profitable basis. The acts of the said defendant, Peter Bercut, in this connection have been open and overt and at all times since January 8, 1941 have been fully known to the officers and directors of Pacific Empire Holdings, Incorporated and are a matter of public knowledge in San Francisco. At all times since January 8, 1941 Pacific Empire Holdings, Incorporated by and through its officers and directors has been fully aware of the acts and conduct of the said Peter Bercut in building up and developing the business of the said Merchants Ice & Cold Storage Company in reliance upon his ownership of the shares of the

Merchants Ice & Cold Storage Company purchased by him from Pacific Empire Holdings, Incorporated, as aforesaid. As a result of the efforts of Peter Bercut, as aforesaid, the shares of Merchants Ice & Cold [457] Storage Company purchased by Peter Bercut have greatly appreciated and enhanced in value since January 8, 1941. Pacific Empire Holdings, Incorporated and plaintiff herein have acquiesced and consented to the acts and conduct of Peter Bercut in reliance upon said contract of sale as hereinbefore alleged and by reason of such acquiescence and conduct upon their part are estopped from denying or questioning the validity of said contract and have been guilty of laches in connection with the matters and things set forth in the complaint on file herein.

XI

On or about the 9th day of September, 1942 plaintiff delivered a purported notice of repudiation of the transaction of the purchase and sale of said shares to Peter Bercut. ~~Plaintiff has failed to tender to defendant, Peter Bercut or Henri Bercut, or Peter and Henri Bercut, the sum of \$35,000.00, of any sum, or any amount at all.~~

XII

Defendants, Peter Bercut and Henri Bercut, ever since January 8, 1941 have been and now are lawfully in possession of the preferred and common shares of Merchants Ice & Cold Storage Company

stock sold and delivered to them pursuant to the contract of January 8, 1941, as heretofore set forth in these findings. No ground exists for the repudiation, recession or setting aside of the said contract and the sale of said shares and said contract at all times, from and after its execution, was, and still is, in full and legal force and effect and has not been lawfully rescinded or modified in any respect whatsoever.

XIII

At no time did defendants, Peter or Henri Bercut, or M. Maffei or L. R. Arnold, convert any shares of Merchants Ice & [458] Cold Storage Company belonging to the Pacific Empire Holdings, Incorporated and none of said defendants are indebted to Pacific Empire Holdings, Incorporated in any sum or in any amount, or at all.

XIV

Pacific Empire Corporation is not a necessary party to the determination of this action.

And as conclusions of law from the foregoing findings of fact:

CONCLUSIONS OF LAW

I

The plaintiff is not entitled to recover from the defendants, Peter Bercut, Henri Bercut, M. Maffei or L. R. Arnold, or all, either or any of them, any shares of the capital stock of Merchants Ice & Cold Storage Company, a California corporation, or any sum, or sums of money, or any other matter or thing.

II

That defendant, Peter Bercut, is entitled to judgment against plaintiff for the delivery of 308 $\frac{2}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company, and defendant, Henri Bercut, is entitled to judgment against plaintiff for the sum of \$3,850.00 and interest thereon.

III

That each and all of the parties hereto pay their own costs of suit herein incurred.

And it is Ordered and Directed that judgment be entered accordingly.

Dated: San Francisco, California,

August

July 9, 1943.

MICHAEL J. ROCHE

Judge

[Endorsed]: Filed Aug. 9, 1943. [459]

In the United States District Court for the Northern District of California, Southern Division

Civil Action—File No. 22339 W

THOMAS H. WINGATE, as Receiver in Equity for Pacific Empire Holdings, Incorporated, a corporation, of the State of Delaware,

Plaintiff,

vs.

PETER BERCUT, HENRI BERCUT, M. MAFFEI and L. R. ARNOLD,

Defendants.

JUDGMENT

The above entitled cause having been duly and regularly heard by the above entitled Court, without a jury, Honorable Michael J. Roche, presiding, a jury trial not having been demanded, and the cause having been argued and submitted, and the Court having rendered his opinion and having made findings of fact and conclusions of law, it is hereby Ordered, Adjudged and Decreed: [460]

I

That plaintiff take nothing by his complaint on file herein. Plaintiff is not entitled to recover from the defendants, Peter Bercut, Henri Bercut, M. Maffei or L. R. Arnold, or all, either, or any of them, any shares of the capital stock of Merchants Ice & Cold Storage Company, a California corporation, or any sum or sums of money, or any other matter or thing.

II

That the defendant, Peter Bercut, have judgment against plaintiff for the delivery of 308 $\frac{2}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company, a California corporation, and defendant, Henri Bercut, have judgment against plaintiff for the sum of \$3,850.00 and interest from date hereof thereon.

III

That each and all of the parties hereto pay their own costs of suit herein incurred.

And the Clerk of the above entitled Court is Ordered and Directed to enter said judgment.

August

Dated: ~~July 9th~~, 1943.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Aug. 9, 1943. [461]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR REHEARING
AND NEW TRIAL

To Louis H. Brownstone and George M. Naus,
Attorneys for Defendants, Peter Bercut and
Henri Bercut; and to J. A. Paradini, Attorney
for Defendants, M. Maffei and L. R. Arnold:

Please Take Notice, and you are hereby notified that the undersigned attorneys for the plaintiff above named will move the above entitled Court before the Honorable Michael J. Roche, judge thereof, in his courtroom at Room No. 307 Post Office Building, Seventh and Mission Streets, San Francisco, California, on Monday, the 9th day of August, 1943, at ten o'clock A. M. thereof, or as soon thereafter as counsel may be heard, for an order setting aside the decision and judgment herein and granting a new trial of the above entitled cause, for the following reasons, viz:

1. The decision is contrary to the law in the case.
2. The decision is contrary to the evidence in the case. [462]
3. The decision is contrary to the law and the evidence in the case.
4. Insufficiency of the evidence to justify the decision herein.

At said time and place plaintiff will further move the Court to set aside and vacate its decision herein and to enter judgment herein in favor of plaintiff on the Findings of Fact and Conclusions of Law submitted and filed herewith by plaintiff.

Said motions will be made and based upon this Notice of Motion, the stenographic report of the evidence, all exhibits admitted into evidence and the minutes, records, pleadings and files of the above entitled Court in the above entitled matter.

Dated: San Francisco, California.

July 22, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELIIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff.

[Endorsed]: Filed July 23, 1943. [463]

District Court of the United States, Northern

District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 9th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Michael J. Roche, D. J.

No. 22339-R Civil

THOMAS H. WINGATE, etc.

vs.

PETER BER CUT, et al.

This case came on regularly this day for hearing on motion to settle findings and motion for rehearing and new trial.

After hearing the arguments of A. J. Scampini, Esq. for plaintiff, and George M. Naus, Esq. for defendants, it is Ordered that the motion for rehearing and new trial be denied. Further Ordered that the findings of fact and conclusions of law proposed by the defendants be approved, and that judgment be entered in favor of defendants in the form this day signed and filed. [464]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
CIRCUIT COURT OF APPEALS

To the defendants Peter Bercut and Henri Bercut,
and to Louis H. Brownstone, Esq. and George
M. Naus, Esq., their attorneys:

To the defendants M. Maffei and L. R. Arnold, and
to Messrs. J. A. Pardini and Elda Granelli,
their attorneys; and

To all persons interested:

Notice is hereby given that Thomas H. Wingate, as receiver in equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, the plaintiff above named, hereby appeals [465] to the Circuit Court of Appeals of the Ninth Circuit from the final judgment in this action by the above entitled court on August 9, 1943, in favor of the defendants Peter Bercut, Henri Bercut, M.

Maffei and L. R. Arnold, and against the plaintiff, and from the whole of said judgment.

Dated: San Francisco, California, August 13, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff
300 Montgomery Street,
San Francisco, California

(Receipt of Service.)

[Endorsed]: Filed Aug. 13, 1943. [466]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN RECORD ON APPEAL.

To the Clerk of the above entitled Court:

The above named plaintiff, appellant herein, designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Complaint.
2. Answer of Peter Bercut, Ernest E. Bercut, Henri Bercut and Jean Bercut.
3. Answer of M. Maffei and L. R. Arnold.

4. Stipulation of the parties permitting the use of certain depositions. [467]
5. Plaintiff's request for admission of certain facts, under rule 36, and plaintiff's interrogatories propounded to the defendant Peter Bercut.
6. Reply of Peter Bercut to said request for admission of facts and answer of Peter Bercut to said propounded interrogatories.
7. The amended answer and counter claim filed in said cause by Peter Bercut and Henri Bercut, et al.
8. The minute order of the court, dated July 6, 1943, directing entry of judgment for the defendants upon Findings of Fact and Conclusions of Law.
9. The Findings of Fact and Conclusions of Law proposed in said cause by the defendants Peter Bercut and Henri Bercut.
10. The exceptions to said proposed Findings of Fact and Conclusions of Law filed in said cause by the Plaintiff.
11. The Findings of Fact and Conclusions of Law proposed by the plaintiff in said cause.
12. Plaintiff's motion for a new trial and rehearing.
13. Minute order of the court denying motion for new trial and rehearing.
14. The Findings of Fact and Conclusions of Law settled by the court.
15. The judgment entered in said cause by the court.

16. The Notice of Appeal.
17. Designation of Portions of the Record to be contained in record on appeal.
18. Designation by the appellee of additional matter to be included in the record.
19. Reporter's Transcript of the evidence.

Dated: San Francisco, California, August 13, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 13, 1943. [468]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF THE
RECORD ON APPEAL

To the Clerk of the above entitled court:

The above named plaintiff, appellant herein, does hereby amend his designation of portions of the record to be contained in the record on appeal filed by him in the above cause on August 13, 1943, and does hereby now designate for inclusion therein the complete record and all the proceedings and evidence in the action, including all exhibits admitted into evidence, and the depositions of Lloyd R. Arnold and Leona Keener.

Dated: San Francisco, California, August 17, 1943.

A. J. SCAMPINI
L. F. MAHAN
ELLIS & STEINDORF
C. T. HUBNER
IVAN CULBERTSON

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 18, 1943. [469]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

The appellant states that the points upon which he intends to rely on the appeal in this action are as follows:

1. The judgment of the trial court is contrary to the law of the case.
2. The judgment of the trial court is contrary to the evidence of the case.
3. The findings of the trial court are contrary to the evidence of the case.
4. The findings of the trial court are not supported by any evidence in the record.
5. The conclusions of law of the trial court are erroneous in law. [470]
6. The conclusions of law of the trial court are

not warranted or supported either by any evidence in the record or by any proper finding.

7. Finding numbered III of the trial court is contrary to the evidence in that the evidence adduced at the trial conclusively discloses that the defendant Peter Bercut was a director, vice president and member of the executive committee of Pacific Empire Holdings, Incorporated, until August 20, 1942, and that the said defendant, together with the defendants M. Maffei and L. R. Arnold, actively managed, supervised and conducted the affairs of said corporation and of its subsidiaries from on or about 1933 to on or about January 8, 1941. The evidence conclusively discloses that defendant Peter Bercut, in all matters and things of any substantial nature appertaining to the conduct of the affairs and business of said corporation and of its subsidiaries, Pacific Empire Corporation, Merchants Ice and Cold Storage Company, and California Pacific Service, Inc., was consulted by the defendants M. Maffei and L. R. Arnold and he participated in the directors and executive committee meetings and approved, without objection, all of the acts and deeds of M. Maffei and L. R. Arnold and of said executive committee during all of said period of time. The evidence further conclusively discloses that said defendant Peter Bercut at no time ever resigned as an officer and director of Pacific Empire Corporation and as a director of Merchants Ice and Cold Storage Company, both of these companies being subsidiaries of Pacific

Empire Holdings, Incorporated. The evidence further discloses that said defendant Peter Bercut, together with the defendants M. Maffei and L. R. Arnold, as the executive officers of Pacific Empire Holdings, Incorporated, and constituting its executive committee, prepared and supervised all financial statements and reports of said corporation mailed to its stockholders during all of said period.

[471]

8. Finding numbered IV of the trial court is contrary to and not supported by any evidence in the record insofar as it finds that on or about January 8, 1941, the 12,493 shares of preferred and 65,863 shares of common capital stock of Merchants Ice and Cold Storage Company owned by Pacific Empire Holdings, Incorporated, was of the reasonable value of not more than \$35,000 and no portion of said shares were then on pledge with Pacific Empire Corporation as security for moneys owing by Pacific Empire Holdings, Incorporated to Pacific Empire Corporation for the reason that,

(a) the evidence in the record conclusively shows that the reasonable value of the 12,493 shares of preferred and the 65,863 shares of common capital stock owned by Pacific Empire Holdings, Incorporated, on January 8, 1941, was then not less than \$250,000;

(b) the evidence in the record conclusively shows that on January 8, 1941, 3,990 shares of preferred and 44,944 $\frac{1}{3}$ shares of common of said capital stock had been and was on pledge

with Pacific Empire Corporation, a California corporation, and then a subsidiary of Pacific Empire Holdings, Incorporated, by virtue of a pledge agreement executed between said corporations on May 15, 1935, by and with the written consent and approval of the defendants Peter Bercut, M. Maffei and L. R. Arnold, who, respectively, were on May 15, 1935, and on January 8, 1941, officers and directors of both corporations.

9. Finding numbered V of the trial court is contrary to the evidence and not supported by any evidence in the record in that the record discloses that on January 8, 1941, Pacific Empire [472] Holdings, Incorporated, had a board of directors consisting of M. Maffei, A. A. Heer, Jr., L. R. Arnold, Luigi Giachino, Webb Richards and R. M. Ryerson, and the defendant Peter Bercut, and an executive committee of three directors, namely, the defendants M. Maffei, L. R. Arnold and Peter Bercut.

10. Finding numbered VII of the trial court is contrary to and not supported by any evidence in the record in that the evidence and the record conclusively show that the defendants M. Maffei and L. R. Arnold, on January 8, 1941, were not acting within the course and scope of their authority for and on behalf of Pacific Empire Holdings, Incorporated, in selling to Peter Bercut for the sum of \$35,000 the 12,493 shares of preferred and 65,863 shares of common stock of Merchants Ice and Cold

Storage Company owned by Pacific Empire Holdings, Incorporated, on that date. The record and evidence further conclusively show that in said transaction the defendants M. Maffei and L. R. Arnold were acting without authority to do so, with the knowledge of the defendant Peter Bercut, who on said day was also an officer and director of Pacific Empire Holdings, Incorporated and a member of its executive committee and knew that said defendants M. Maffei and L. R. Arnold had no authority to enter into said transaction for and on behalf of Pacific Empire Holdings, Incorporated. The record and the evidence further conclusively show that the agreement of sale dated January 8, 1941, purported to have been entered into by and between Pacific Empire Holdings, Incorporated, acting through the defendants M. Maffei and L. R. Arnold and the defendant Peter Bercut, was unfair and inequitable to Pacific Empire Holdings, Incorporated, in that the reasonable value of said shares of stock on said day was not less than \$250,000, and in that no effort was made by the officers of the corporation to obtain a higher price than that offered by defendant Peter Bercut for said [473] block of stock and in that the directors of said corporation, other than the defendants M. Maffei, L. R. Arnold and Peter Bercut, were kept in ignorance of said negotiations and said transactions, and the stockholders of said corporation were kept in ignorance of said negotiations and said transactions and in that no meeting of

either the executive committee or of the board of directors or of the stockholders of said corporation was ever called or held for the purpose of authorizing or approving or ratifying the said transaction. The record and the evidence further conclusively show that said transaction was not entered into in good faith or after lengthy negotiations between said parties, but on the contrary was entered into hastily, secretly and for an unfair consideration and for the purpose of avoiding and defrauding the rights of the creditors of Pacific Empire Holdings, Incorporated, including the United States of America, which had obtained a judgment on or about November 20, 1940, against Pacific Empire Holdings, Incorporated and which judgment was and still is unsatisfied. The record and the evidence conclusively show that no disclosure of the facts and circumstances of said transaction was ever made by the defendant Peter Bercut, L. R. Arnold or M. Maffei to the board of directors of Pacific Empire Holdings, Incorporated, until on or about August 20, 1942, at which time and for the first time since January 8, 1941, a meeting of the board of directors of said corporation was called and held and at said meeting the said transaction was disaffirmed by said board of directors pursuant to its rights reserved in and by virtue of Section 2 of Article VII of the By-Laws in evidence. The record and the evidence further conclusively show that the defendants Peter Bercut, M. Maffei and L. R. Arnold, in the course of said negotiations and

at the time of the completion of said transaction on January 8, 1941, were not disinterested officers [474] or directors of Pacific Empire Holdings, Incorporated, but on the contrary were interested personally and individually in said transaction and had an adverse interest to Pacific Empire Holdings, Incorporated.

The record and evidence in the case further conclusively show that the said transaction of January 8, 1941 was entered into in violation of sections 311,343 and 3439.04 and 3439.07 of the Civil Code of California, and section 65 of the Delaware Corporation Laws then in force and effect.

11. Finding numbered VIII of the trial court is contrary to the evidence in that the evidence and record conclusively show that Pacific Empire Holdings, Incorporated, did not receive the sum of \$35,000 for said shares, but on the contrary received the sum of approximately \$4,000.

12. Finding numbered IX of the trial court is contrary to and not supported by any evidence in the record for the reason that the evidence conclusively shows that as a direct and proximate result of the said transaction had by and between the said defendants M. Maffei, L. R. Arnold and Peter Ber-cut on January 8, 1941, Pacific Empire Holdings, Incorporated, was rendered insolvent and unable to meet its obligations.

13. Finding numbered X of the trial court is contrary to and not supported by any evidence in the record in that the record and the evidence conclusively show that on January 8, 1941, and prior

thereto and thereafter, Merchants Ice and Cold Storage Company was in a solvent condition and a going concern with a net book worth of \$1,415,725.00; that it had at all times met its obligations when due; that it had never defaulted in any of its obligations and that the business of said corporation had shown an increase, in the year 1940, over previous years, and that the value of the outstanding [475] capital stock of said corporation was higher on January 8, 1941 than it had ever been at any time prior thereto for some years.

The record and the evidence further conclusively show that the facts and circumstances relating to the purported purchase and sale of the said shares of Merchants Ice and Cold Storage Company owned by Pacific Empire Holdings, Incorporated, by Peter Bercut were at no time known to any of the officers of directors of Pacific Empire Holdings, Incorporated, other than the defendants L. R. Arnold, M. Maffei and Peter Bercut, until August 20, 1942. The record and the evidence further conclusively show that the sum of \$33,000 paid for said shares by Peter Bercut was not a fair, reasonable and proper price for said shares for the reason that said shares had a reasonable value on January 8, 1941 of not less than \$250,000. The record and the evidence further conclusively show that the facts and circumstances of said transaction were wilfully suppressed by the defendants M. Maffei, L. R. Arnold and Peter Bercut from the stockholders and creditors of Pacific Empire Holdings, Inc. The rec-

ord and the evidence conclusively show that the directors of Pacific Empire Holdings, Inc., (other than the defendants M. Maffei, L. R. Arnold and Peter Bercut) and plaintiff acted promptly in disaffirming the said transaction when all of the facts and circumstances thereof were brought to their knowledge, and at no time have they or the stockholders or creditors or Pacific Empire Holdings, Inc. ever acquiesced in or consented or approved or ratified or confirmed the said transaction, either formally or informally, or by reason of any act or conduct on their part.

13. Findings numbered XII and XIII of the trial court are contrary to the evidence and the record and the law of the case [476] in that the defendants Peter Bercut and Henri Bercut are not lawfully in possession of the shares of Merchants Ice and Cold Storage Company delivered to Peter Bercut pursuant to the agreement dated January 8, 1941, and said defendants, together with the defendants M. Maffei and L. R. Arnold, unlawfully converted the said shares to their own use and benefit, for the reasons that

(a) the transaction purported to have been entered into by and between M. Maffei, as president, and L. R. Arnold, as secretary, of Pacific Empire Holdings, Incorporated, and Peter Bercut, on January 8, 1941, wherein and whereby the said shares of Merchants Ice and Cold Storage Company were delivered to and received by the defendant Peter Bercut, was not a valid, corporate act of Pacific

Empire Holdings, Incorporated, or binding upon it or plaintiff herein;

(b) said M. Maffei, as president, and L. R. Arnold, as secretary, of Pacific Empire Holdings, Incorporated, had no authority for and on behalf and in the name of said corporation to enter into said transaction, and each of them lacked proper authority to do so or to affix the corporate seal to said document, and such lack of authority was known to Peter Bercut;

(c) said transaction was not authorized, ratified, approved or confirmed by the executive committee or the board of directors or the stockholders of Pacific Empire Holdings, Incorporated;

(d) said transaction was disaffirmed by the board of directors of Pacific Empire Holdings, Incorporated, and plaintiff herein, promptly upon the facts and circumstances of said transaction having been brought to their attention.

(e) at the time of the said transaction the defendants M. Maffei, L. R. Arnold and Peter Bercut were officers and directors [477] of Pacific Empire Holdings, Incorporated, and constituted its Executive Committee, and the said transaction was unfair and inequitable to Pacific Empire Holdings, Incorporated, and entered into by said parties hastily, secretly and without adequate consideration being received by Pacific Empire Holdings, Incorporated, and without the facts and circumstances thereof being, either before or thereafter, until August 20,

1942, fully disclosed to the directors or stockholders of Pacific Empire Holdings, Incorporated.

(f) the said transaction was entered into in violation of the fiduciary obligations then and there owing to Pacific Empire Holdings, Incorporated, by the defendants M. Maffei, L. R. Arnold and Peter Bercut.

(g) the said transaction was entered into in violation of Sections 311, 343, 3439.04 and 3430.07 of the Civil Code of the State of California, and Section 65 of the Delaware corporation laws then in force and effect.

(h) the said transaction constituted a fraud upon the creditors and stockholders of Pacific Empire Holdings, Incorporated and was entered into by the said defendants M. Maffei, L. R. Arnold and Peter Bercut wilfully and with intent to hinder, defraud and delay the creditors of Pacific Empire Holdings, Incorporated.

(i) the said transaction constituted fraud upon Pacific Empire Holdings, Incorporated.

(j) at said time, to-wit, January 8, 1941, the said defendants M. Maffei, L. R. Arnold and Peter Bercut were trustees of Pacific Empire Holdings, Incorporated, and said transaction was entered into in violation of their trustees' obligation and in violation of Sections 2223, 2224, 2228, 2229, 2230, 2231, 2233 and 2234 of the Civil Code of the State of California. [478]

(k) plaintiff and Pacific Empire Holdings, In-

corporated, are not estopped either by laches or limitations from repudiating the said transaction by reason of the acts and conduct of the said defendants M. Maffei, L. R. Arnold and Peter Bercut in suppressing the facts and circumstances of said transaction from the directors, creditors and stockholders of Pacific Empire Holdings, Incorporated, until on or about August 20, 1942.

(1) the said transaction was promptly and seasonably repudiated and rescinded by plaintiff and the board of directors of Pacific Empire Holdings, Incorporated, when all of the facts and circumstances thereof were made known to them, and plaintiff, as receiver of Pacific Empire Holdings, Incorporated, did promptly offer to restore to the defendant Peter Bercut any and all consideration paid by him to Pacific Empire Holdings, Incorporated, as the result of said transaction, prior to the institution of the above entitled action and again in open court during the trial thereof.

14. The conclusions of law of the trial court are erroneous in law, contrary to the law and equity of the case, and not warranted by any proper finding, in that the proper findings of the case warranted by and consistent with the evidence in the case are the findings of fact proposed to the trial court by the plaintiff, which findings were refused by the trial court.

15. Plaintiff is entitled, under the evidence in the record and the law of the case to a judgment

against the defendants Peter Bercut and Henri Bercut for the return of all the shares of common and preferred stock of Merchants Ice and Cold Storage Company delivered to Peter Bercut by the defendants M. Maffei and L. R. Arnold as the result of the transaction between said parties dated January 8, 1941, for the reason that said transaction [479] (as stated in point 13 hereof) was and is void as to Pacific Empire Holdings, Incorporated, and plaintiff.

16. The defendants Peter Bercut and Henri Bercut, by reason of their conduct in the premises, are not entitled to any affirmative judgment or relief against the plaintiff of any kind or character.

17. The judgment of the trial court should be reversed and the trial court directed to enter judgment in said cause against the defendants Peter Bercut, Henri Bercut, M. Maffei and L. R. Arnold.

(a) for the return to plaintiff of all shares of common and preferred stock of Merchants Ice and Cold Storage Company received by either of them as the result of the transaction between said parties dated January 8, 1941; and

(b) each of said defendants should be ordered to account for and pay over to plaintiff any profits earned or made by them, directly or indirectly, as the result of said transaction;

(c) and ordered to pay to plaintiff all proper costs incurred by plaintiff in this action.

Dated: San Francisco, California, August 19, 1943.

Respectfully submitted,
A. J. SCAMPINI
L. F. MAHAN
ELLIS & STEINDORF
C. T. HUBNER
IVAN CULBERTSON
Attorneys for Appellants.

Receipt of Service.

[Endorsed]: Filed Aug. 19, 1943. [480]

[Title of District Court and Cause.]

STIPULATION AUTHORIZING USE OF
EXHIBITS ON APPEAL IN ORIGINAL
FORM

The above named plaintiff having duly filed in the above entitled cause his notice of appeal to the Circuit Court of Appeal, Ninth Circuit, from the judgment rendered by the above entitled Court on August 9, 1943, in favor of the defendants, and having designated for inclusion in the record of appeal the complete record and all the proceedings and evidence in the action, including all exhibits; and all depositions admitted into evidence;

It is hereby stipulated that all exhibits whether marked for identification or introduced in evidence, have been and are designated for inclusion in the record on appeal herein.

It is further stipulated that all exhibits in said cause may be sent to the Appellate Court in their original form in lieu of copies, and that the depositions of Lloyd R. Arnold and Leona Keener may be sent to the Appellate Court in their original form instead of copies.

It is further stipulated that the original deposition of A. A. Heer, filed by the plaintiff in said cause but not read or admitted into evidence at the trial of said cause, shall remain with the Clerk of the above Court until the further order of the Court and shall not be sent to the Appellate Court as part of said record on appeal.

It is further stipulated that the briefs filed in said cause by the plaintiff and the defendants shall not be deemed to be a part of the record on appeal to be sent to the Appellate Court. [481]

Dated: San Francisco, California, August 20th, 1943.

L. F. MAHAN
ELLIS & STEINDORF
IVAN CULBERTSON
CONRAD T. HUNTER
A. J. SCAMPINI

Attorneys for Plaintiff

J. A. PARDINI &
ELDA GRANELLI

Attorneys for Defendants, N. P.
Lloyd R. Arnold and M. Maffei

LOUIS H. BROWNSTONE

GEORGE M. NAUS

Attorneys for Defendants,

Peter Bercut and Henri Bercut

ORDER

The above stipulation is hereby approved and it is so ordered.

A. F. ST. SURE

Judge of the District Court

[Endorsed]: Filed Aug. 24, 1943. [482]

District Court of the United States

Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 482 pages, numbered from 1 to 482, inclusive, together with two volumes of depositions, contain a full, true, and correct transcript of the records and proceedings in the case of Thomas H. Wingate, etc., plaintiff, vs. Peter Bercut, et al., No. 22339-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Forty-one dollars and seventy-

five cents (\$41.75) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of September, A .D. 1943.

[Seal]

C. W. CALBREATH,
Clerk,
WM. J. CROSBY,
Deputy Clerk. [483]

[Endorsed]: No. 10550. United States Circuit Court of Appeals for the Ninth Circuit. Thomas H. Wingate, as receiver in equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Appellant, vs. Peter Bercut, Henri Bercut, M. Maffei and L. R. Arnold, Appellees. Transcript of Record upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 13, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10550

In the United States Circuit Court of Appeals
for the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated, a
corporation of the State of Delaware,

Appellant,

vs.

PETER BER CUT, HENRI BER CUT,

M. MAFFEI, L. R. ARNOLD, et al.,

Appellees.

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

The above named appellant does hereby designate for printing, in its entirety, the record of the above entitled cause as certified by the clerk of the United States District Court for the Northern District of California, Southern Division, including the following particular exhibits admitted into evidence, namely:

Plaintiff's Exhibits 1, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 28, 29, 30, 31, 32, 33, 34, 35 and 38, omitting all other exhibits.

Dated: San Francisco, California, September 20, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Appellant

IVAN CULBERTSON

Of Counsel

Receipt of service.

[Endorsed]: Filed Sep. 22, 1943. Paul P. O'Brien,
Clerk.

[Title of Circuit Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD TO BE PRINTED

Comes now appellees, Peter Bercut and Henri Bercut, and do hereby designate for printing the following additional portions of the record herein, namely:

(1) Plaintiff's and Appellant's Exhibit 7;

(2) Defendants' and Appellees, Peter Bercut and Henri Bercut, Exhibits A, B, C, D, E, F, G, I, J, K and M.

Dated: San Francisco, California, September 30th, 1943.

LOUIS H. BROWNSTONE
GEORGE M. NAUS

Receipt of service.

[Endorsed]: Filed Oct. 1, 1943. Paul P. O'Brien,
Clerk.